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DATE OF SERVICE

APR 27 1966

F-9331

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 21989[1]

PENNSYLVANIA RAILROAD COMPANY–MERGER–NEW YORK CENTRAL RAILROAD COMPANY

Decided April 6, 1966

1. In Finance Docket No. 21989, merger of the properties and franchises of the New York Central Railroad Company into the Pennsylvania Railroad Company for ownership, management and operation and the acquisition by the surviving company, to be known thereafter as Pennsylvania New York Central Transportation Company, of (1) sole or joint control of carriers subsidiary to or affiliated with the merged company and (2) leases of and contracts to operate properties of other carriers and trackage rights over the lines of other carriers and terminals incidental thereto now held jointly or otherwise by the merged carrier, approved and authorized. Conditions prescribed.
2. New York, Susquehanna and Western Railroad Company and the New York, New Haven and Hartford Railroad Company, included in the transaction subject to further proceedings to determine terms and conditions for said inclusions. Provision made for (a) additional proceedings to deal with inclusion of Erie-Lackawanna Railroad Company, Delaware and Hudson Railroad Corporation, Boston and Maine Railroad Corporation, Brooklyn Eastern District Terminal; and (b) interim protection of Erie-Lackawanna Railroad Company, Delaware and Hudson Railroad Corporation, and Boston and Maine Railroad Corporation. Petition of Brooklyn Eastern District Terminal and the Maryland and Pennsylvania Railroad Company for inclusion in the transaction denied without prejudice.
3. In Finance Docket No. 21990, authority granted to the Pennsylvania Railroad Company to (a) issue not exceeding 9,600,000 shares of its common stock of the par value of $10.00 per share in exchange for the outstanding common stock of the New York Central Railroad Company at the rate of 1.3 shares of Pennsylvania Railroad Company stock for each share of New York Central Railroad Company stock and, as may be necessary, in connection with options to purchase stock of the New York Central Railroad Company, outstanding and unexercised on the effective date of the merger authorized hereinabove; (b) to issue (including sale, pledge, or other disposition) other securities the New York Central Railroad Company is authorized prior to the effective date of the merger to issue under section 20a of the Interstate Commerce Act, to the extent any such authorizations

[1] This report also embraces Finance Docket No. 21990, Pennsylvania Railroad Company Stock Issuance.

remain unexercised; and (c) to assume all obligations and liabilities of the New York Central Railroad Company in respect of securities issued by that carrier pursuant to authorizations under section 20a of the Interstate Commerce Act or as permitted by paragraph (9) of said section, and of securities of others in respect of which the New York Central Railroad Company shall have been granted authority to assume obligation or liability under section 20a of the Interstate Commerce Act prior to the effective date of the merger, all in connection with the aforesaid merger.

Eugene E. Anderson, Richard R. Bongartz, Robert D. Brooks, W. Graham Claytor, Jr., Windsor F. Cousins, Basil S. Cole, Jr., James B. Gray, Charles I. Hopkins, Jr., William C. Leiper, Robert W. Minor, Richard J. Murphy, John B. Prizer, Ulrich Schweitzer, and *Edwin K. Taylor* for applicants.

W. R. Althaus, Andrew C. Armstrong, Joseph Auerbach, Charles W. Bartlett, Hewitt Biaett, Arthur Blasberg, Jr., Robert W. Blanchette, Robert G. Bleakney, Jr., Edward W. Bourne, S. R. Brittingham, Jr., Martin Cassell, John P. Clark, Raymond S. Clark, Charles H. Clay, Clinton T. Crolius, John C. Danielson, Donald D. Dart, T. E. Desch, James H. Durkin, S. S. Eisen, Phil D. Fine, James W. Grady, James A. Gillen, Rene J. Gunning, James H. Hawk, Alfred W. Hesse, Jr., Frederick G. Hoffman, Neal Holland, A. W. Laisy, Leon Leighton, Edward A. McDermott, Norman C. Melvin, Jr., Raymond K. Merrill, James W. Moore, Joseph T. Morrow, P. C. Mullen, Thomas W. Murrett, John J. Nee, W. H. Parsons, Warren H. Ploeger, H. Roy Pope, Jr., William C. Purnell, William P. Quinn, Harry Shereff, Louis H. Shereff, Harry G. Silleck, Jr., M. C. Smith, Jr., William J. Taylor, William H. Towle, Richard B. Wachenfeld, George W. Whittaker, and *John N. Worcester* for rail, motor, and water carrier interveners.

Kenneth B. Ackerman, Jack I. Alspector, Robert Ambler, George L. Anderson, Don Andrews, Robert H. Antell, Herschel Atkinson, Jack Austin, George Babcock, Herbert Baer, John F. Bartus, Edward G. Bauer, Jr., Robert M. Beckman, Harry D. Beaver, Jr., David Berger, John Berger, Jr., George L. Betro, O. Francis Biondi, Ralph A. Boniello, Frederick L. Bowyer, Sidney Brandes, Herbert L. Breckheimer, Jeremiah F. Brennan, Richard M. Brennan, Harold C. Brewer, Carl N. M. Brown, F. Joseph Buckley, Francis B. Burch, Joseph B. Burns, William C. Burt, Walter K. Cabot, Eugene A. Caputo, Kenneth S. Carberry, J. J. Carroll, Philip B. Carter, John F. K. Cassidy, Phillip Thomas Catalano, J. S. Chartrand, Lawrence E. Chase, Robert N. Chase, Charles E. Chlan, Lee A. Christiensen, William L. Clay, D. T. Clem,

Cyril W. Cade, Ralph J. Coffman, Godfrey W. Collins, Richard E. Costello, John C. Cotner, Howard S. Congdon, Kenneth P. Courtney, David W. Craig, Carl F. Cress, Arthur B. Curran, Jr., Maurice A. Curtis, J. J. Danaher, James M. Davis, Jr., Charles De Fazio, Jr., Robert De Kroyft, Thomas E. Delahunt, Leslie H. Deming, John P. Dennis, L. A. Denglow, Joseph P. Desmond, Louis Dadowski, Charles Donley, Nelson B. Doyle, Augustus S. Dreier, Harry Dudkin, Samuel W. Earnshaw, Franklin S. Eggleston, Julian W. Edgcomb, W. J. Edmonds, John P. Fitzgerald, John T. Floyd, Jr., Gerald E. Franzen, Joseph H. Gass, Ralph E. Giles, Fred Donald Goad, J. Eugene Goddard, Robert Godfrey, William W. Goodman, William D. Gordon, Jay B. Gribbell, James B. Griffin, Karl J. Grimm, John W. Grow, C. W. Van Gundy, Jr., James M. Haley, James L. Harkins, Louis B. Hartlage, Jr., Francis J. Hartman, John B. Hedges, Edward L. Hefron, Edward D. Heilbrun, Leslie C. High, S. L. Hirschberg, Frank Horton, James S. Hostetler, Jarvis Hunt, Mark Hunt, William J. Hurst, Louis P. Iannini, R. Stanley Jacobsen, Mark M. Jones, Stephen E. Jones, Jack W. Jordon, Lewis Kates, Warren Brody, Sidney B. Kaufman, J. Edward Keefe, Jr., Mark L. Keith, R. E. Keith, J. Frank Kelker, Carl M. Kerchner, Leon Keyserling, George C. Kiba, Roy K. Kinnamon, George H. Kinney, Jack B. Kirsten, Bronis Klementowicz, Murray Koenig, Roy H. Kranz, Eugene Landis, Hamilton R. Large, Fay W. Leas, A. E. Leitherer, Lawrence Levine, Robert P. Levine, Melvin Lievense, Thomas J. Logue, Maurice Louik, A. M. Lownsbury, John A. Lyons, John D. MacRitchie, Samuel Mandell, Garland Masterson, Arthur J. Maurer, John W. Mayer, Cyril J. McCauley, Charles K. Michael, O. H. Miller, Leon S. Milmed, Leo T. Minton, Forest H. Montgomery, John R. Moss, Ronald M. Mottl, Edwin F. Mundy, John J. Naples, Albert J. Natick, Otto H. Neumann, Phillip Nusholtz, Jerome J. O'Dowd, Israel Packel, Edward A. Pastewka, Melvin D. Peach, Roger E. Peters, John W. Peterson, George E. Pratt, Norman J. Putman, Franklin Reinhold, Harvey R. Robinson, John T. Robison, Armistead B. Rood, Thomas M. Rutter, Ralph Sandor, Reynold J. Sentieri, Genevieve W. Settino, James L. Scarazzo, Jr., Louis W. Schaller, Sanford L. Schamus, Norman N. Schiff, Charles A. Schoeneck, Milton J. Shapp, Frank G. Shea, Harry G. Silleck, Jr., Hugh R. H. Smith, Joseph J. Soporowski, Royle L. Sprunger, James L. Stern, Garland F. Stickler, Fred V. Stiers, Robert E. Swert, Douglas Temple, W. L. Travis, T. James Tumulty, John

C. Tuttle, J. Ed Uland, Sam Vidnovic, Ralph A. Villani, Robert L. Walker, Earl S. Ward, Gerald J. Weber, George W. Whittaker, James E. Wilber, Ralph C. Wilgus, Stephen B. Williams, John Carroll Young, James W. Zimmerman, and *Nathan Zinader* for counties, municipalities, shippers and receivers, civic and other organizations and individuals.

William H. Bowe, Albert D. Brandon, W. H. Brown, John T. Collins, Raymond Corbett, Arthur E. Coughlin, J. Murray Dunn, Donald W. Fisher, Peter F. Flaherty, C. L. Glass, Stephen A. Glickman, William G. Mahoney, Edward A. Martin, Michael Matwey, J. T. McNeal, Howard N. Meyer, Howard B. Minier, John F. O'Donnell, Paul O'Dwyer, Robert C. Pitsch, Harold A. Ross, Henry P. Schmidt, Leo. I. Shapiro, Donna K. Simpson, W. T. Skutt, S. D. Thompson, Paul Treska, R. F. Ventrella, William J. Weil, and *Gilbert B. Wood* for railway labor organizations.

Robert W. Alvord, Herbert Baer, Roy C. Batalia, David M. Brackman, Robert Broughton, John A. Calhoun, Louis J. Carter, J. Raymond Clark, John J. Coffey, William R. Connole, Morris Duane, Joe Ectman, John G. Feehan, Henry B. Freefield, Benjamin F. Gibson, William A. Goichman, Chester H. Gourley, Frederic T. Greenhalgé, William Gural, Edward V. Hanrahan, Robert M. Harris, James M. Henderson, Frank E. Hickey, Samuel Kanell, John M. Kistler, Philip G. Kraemer, Ronald Laqueux, Edward K. Laux, Carter Lee, J. Bruce MacDonald, Gordon P. MacDougall, Donald Macleay, William L. Marbury, Samuel H. Moerman, Francis A. Mulhern, Walter J. Myskowski, Mortimer W. Newton, Courts Oulahan, Roy O. Papalia, George M. Phillips, Warren Price, Jr., Alan Miles Ruben, Nicholas Saros, Robert M. Schacht, Charles R. Seal, Edward G. Seferian, Otto F. Sonefeld, Morton Stanley, Eugene F. Sullivan, Duntan F. Tynan, Arthur L. Winn, Jr., and *Arne C. Wiprud* for States and regulatory agencies.

Joseph V. Gallagher, William H. Orrick, Jr., Jack Pearce, and *Joseph J. Saunders* for the United States of America, Department of Justice.

David M. Dantzler, Asa Merrill, Herman F. Mueller and *Daniel M. O'Donoughue* for the Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION

TUGGLE, *Commissioner:*

Exceptions to the hearing examiners' report and recommended order[2] have been filed by the State of Connecticut Public Utilities

[2]Hereinafter called the initial report.

Commission (Conn. PUC); Brooklyn Eastern District Terminal (BEDT); Commonwealth of Pennsylvania (Pennsylvania); Boston and Maine Corporation (B&M); The Boston & Providence Railroad Stockholders Development Group (B&P Minority Interests); The Central Railroad Company of New Jersey (CNJ); Chicago & Eastern Illinois Railroad Company (C&EI); The Delaware and Hudson Railroad Corporation (D&H); the Boroughs of East Rochester, Freedom, and Conway, Pa.; Erie-Lackawanna Railroad Company (E-L); Brotherhood of Locomotive Engineers (BLE); International Association of Machinists (Machinists); the Commonwealth of Massachusetts Department of Public Utilities (Mass. DPU); Maryland Port Authority and Chamber of Commerce of Metropolitan Baltimore (Baltimore Interests); Monon Railroad (Monon); New England Council (NE Council); the State of New Jersey and its Board of Public Utility Commissioners (N. J. PUC); the State of New York (New York); The Port of New York Authority and the City of New York (PNYA); Railway Labor Executives' Association (RLEA); Governor John H. Chafee and the Division of Public Utilities of the State of Rhode Island (R. I. DPU); Reading Company (Reading); Stockholders Protective Committee of The Peoria and Eastern Railway Company (Levine Group); Milton J. Shapp (Shapp); Western Maryland Railway Company (WM); and the Department of Justice (Department). Replies have been filed by the Boroughs of East Rochester, Freedom, and Conway, Pa.; Chamber of Commerce of Greater Pittsburgh (Pittsburgh C of C); the applicants; County of Allegheny, Pa.; B&M; D&H; E-L; Greater Hazleton Chamber of Commerce (Hazleton C of C); Baltimore Interests; New York; PNYA; Richard Joyce Smith, William J. Kirk, and Harry W. Dorigan, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor (NH); Borough of Ambridge, Pa., Borough of Baden, Pa., City of Allentown, Pa., City of Pittsburgh, Pa., and Milton J. Shapp. We have heard the parties in oral argument. Our conclusions differ in some respects from those of the hearing examiners.

By joint application in the title proceeding, Finance Docket No. 21989, filed March 9, 1962, The Pennsylvania Railroad Company (PRR) and the New York Central Railroad Company (NYC), common carriers by railroad subject to the provisions of part I of the Interstate Commerce Act, seek authority under section 5(2) of the act (a) to merge the properties and franchises of NYC into PRR, which corporation would thereupon change its name to

Pennsylvania New York Central Transportation Company (Transportation Company); (b) for PRR to acquire, through the merger, sole or joint control of the carriers subsidiary to or affiliated with NYC; and (c) for PRR to acquire leases of and contracts to operate properties of other carriers and trackage rights now held jointly or otherwise by NYC over lines of other carriers and terminals incidental thereto.

By simultaneously filed application in Finance Docket No. 21990, the applicants seek authority under section 20a of the act for PRR to (a) issue not exceeding such number of shares of its capital stock, par value $10.00 per share, as may be necessary to issue 1.3 shares of its capital stock for each share of NYC capital stock issued and outstanding as of the close of business on the last business day preceding the effective date of the merger and as may be necessary after the merger in connection with options to purchase stock of NYC, outstanding and unexercised, on the effective date of the merger; (b) issue (including sale, pledge, or other disposition of) other securities NYC has been authorized under section 20a to issue to the extent any such authorization remains unexercised; and (c) to assume all obligations and liabilities of NYC in respect of securities issued by NYC prior to the effective date of the merger pursuant to authorization under section 20a or as permitted by paragraph (9) of such section, and of securities of others in respect of which NYC shall have been granted section 20a authority to assume obligation or liability prior to the effective date of the merger.

By petitions filed June 26, September 19, and October 12, 1962, and January 14, January 29, and February 11, 1963, respectively, NH, BEDT, New York, Susquehanna and Western Railroad Company (NYS&W), E-L, D&H, and B&M seek inclusion in the transaction if the merger is approved.

Various carriers, State and local government agencies, civic, business and employee organizations, shippers, and individuals intervened in support of, or opposition to, the applications or as their respective interests might appear. A 130-day public hearing was held at which the Department appeared in opposition to the merger and in which our former Bureau of Inquiry and Compliance participated at our direction.[3] Briefs were filed by various parties, following which the initial report was served.

The proposed consolidation and the related issues of securities and assumption of obligations were found by the hearing examiners

[3] On June 7, 1965, B.O.I.C. functions and others relating to enforcement were assigned to the newly formed Bureau of Enforcement.

to be consistent with the public interest. Approval of the transactions was qualified, however, by conditions for—the protection of adversely affected employees; the preservation of existing interchanges with connecting railroads; simplification of the Transportation Company's corporate structure; revision of motor carrier certificates; agreement to certain rail-water-rail rates and divisions; maintenance at present levels for one year, trackage rights payments received by NYC from C&EI; inclusion in the merger transaction of the entire operation of NYS&W and the freight operation of NH; a grant of trackage rights to D&H and a joint effort in constructing necessary connecting tracks; divestiture of all Transportation Company interest in certain designated existing or prospective affiliates of Norfolk and Western Railway Company (N&W) or The Chesapeake and Ohio Railway Company (C&O); reciprocal switching arrangements with other carriers in the Pittsburgh Switching District; the provision for inclusion of the Lehigh Valley Railroad Company (LV) in the system of C&O or, under stated circumstances, in that of N&W and, pending its inclusion in either system, maintaining LV in operating condition financially and physically; maintenance of the competitive relationship between the Port of Erie, Pa. and other ports; the filing under certain stated circumstances of petitions for inclusion in the Transportation Company of NH's passenger operations, of BEDT (within 5 years following the consummation of the merger), and of E-L, D&H, and B&M (within 10 years); and retention of jurisdiction to enforce the foregoing conditions.

The initial report provides a detailed and adequate account of the applicants, their finances, operations, and proposed merger, the positions of interveners, and the general background[4] and effects of the transaction, except for certain matters hereinafter noted which arose after the hearings. All interested parties have been served with that report, and (except for the portion preceding page 7—most of which has been repeated here) it will be attached to the report bound in printed form in the permanent series of Interstate Commerce Commission reports. Therefore, the detailed factual matter stated therein will not be repeated here. We adopt the examiners' account of the facts, since no material exceptions were taken thereto, most exceptions having been directed at the conclusions. Also adopted are those conditions, findings and conclusions of the hearing examiners (including those

[4]See in particular sheets 165-175 of the initial report for a description of the competitive rail structure in the east.

pertaining to procedural and evidential matters) which we do not here modify or reject. See appendix A.

No exceptions have been taken to the part of the initial report regarding the application in Finance Docket No. 21990, and to the extent it is not inconsistent with our own findings and conclusions, that part is specifically adopted without further discussion.

Shapp excepts to an alleged noncompliance with the Administrative Procedure Act through what he calls a failure "to set forth with particularity findings of fact to support [the] conclusions," and a failure to make "a specific enumeration of findings" at one place rather than spread throughout the report. We find no serious impediment in this respect and can see no basis for this exception. True, the initial report is unusually large (reflecting the size of the transaction) and covers a wide range of issues, but it has been adequately organized and indexed, and in the context of this exception, is not unwieldy.

EXCEPTIONS TO INITIAL REPORT

At the inception of these proceedings numerous shippers, communities, organizations and individuals intervened in opposition, but for the most part they were troubled more by uncertainty regarding the applicants' proposals than by any concrete expectations of injury. Much of the early opposition either has become inactive or has been formally withdrawn as in the case of the cities of Pittsburgh, Philadelphia, and New Castle, and the Borough of Ambridge, Pa.

Most of that remaining is conditional only: rather than to the merits of the merger per se, it is pressed only for the purpose of obtaining—protective conditions for traffic, gateways, or employees; the inclusion of other carriers, the relief of other carriers from contractual obligations; or the protection of minority stockholders. Presumably, if this relief is granted, the conditional opposition to the merger would be satisfied. As may be inferred from its nature, this opposition is expressed mainly by connecting carriers or agencies of State and local government and service organizations in the territory served by carriers seeking inclusion or other protection.

Advocating inclusion of NH's passenger service as well as its freight service are Conn. PUC, Mass. DPU, R.I. DPU, BLE, Machinists, RLEA and New York. PNYA opposes this transaction

unless E-L is simultaneously included in N&W. Also concerned for E-L status is the N. J. PUC, while the NE Council urges inclusion of B&M and D&H in this transaction. The Baltimore interests press for protection of WM in the event that carrier's control is acquired by C&O, and New York opposes inclusion of E-L, D&H, and B&M in this instead of the N&W system. The B&P Minority Interests seek inclusion of the Boston and Providence Railroad Corporation in its own right rather than as an operation of NH. The Levine Group request protective conditions for minority stockholders of The Peoria and Eastern Railway Company, and C&EI and Monon both request relief from certain contractual obligations. The Commonwealth of Pennsylvania on exceptions sought safeguards for other railroads serving it, and consideration of secondary results of the merger, i.e., the welfare of employees of other railroads affected, the secondary employment resulting from railroad operations, the maintenance and retention of industry already located in Pennsylvania, and the Commonwealth's ability to attract new industry.

Now after oral argument, the only unqualified opposition to the merger is that of Shapp and various local Pennsylvania political entities jointly represented at oral argument. The Department continues to argue, as it has from the beginning, that the applications should be denied. It now acknowledges, however, that there are factors which may persuade us to approve the merger, and it urges that, if we do so, the passenger service of NH should be included as well as the freight service; that applicants should be required to divest themselves of control of the Pittsburgh and Lake Erie Railroad (P&LE); and consummation of the merger should be delayed for 18 months.

Shapp argues that the merger will have injurious effects upon the Commonwealth of Pennsylvania. He contends that the slower economic growth in the Eastern District as compared to that of the Nation as a whole is directly caused by Pennsylvania's failure to keep pace with other areas. Since, he theorizes, transportation must precede economic growth, the way to improve the economic status of the Eastern District is to augment transportation facilities in Pennsylvania. Underscoring the applicants' proposals for rerouting traffic and consolidating facilities, he characterizes the merger as the greatest economic threat facing Pennsylvania today: the worst threat since the opening of the Erie Canal in 1825, one that can only result in virtually crippling the Port of Erie and seriously handicapping the Port of Philadelphia

in its "unending battle with Baltimore and New York for general cargo."

On January 3, 1966, Shapp petitioned to reopen the record purportedly to present newly discovered evidence characterized as showing substantially changed conditions and changed plans of operation of the Transportation Company.

The proferred evidence is a speech by the Chairman of PRR's board of directors delivered, December 16, 1965, before the mayor and city councilmen of New Castle, Pa., at which time a tape recording was made;[5] and documents which PRR's Chairman displayed to his audience and described as "two full books" of plans for operating the Transportation Company different from those about which testimony was given at the hearing. Shapp contends that this evidence portrays a radically different situation intervening since the record was closed, "within the special rule of *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U.S. 248 (1932)," and that the record should be reopened for its receipt as new evidence "within the general rule as enunciated in *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944)."

A copy of the speech certified to be true and correct by the sound engineer recording it, appended to Shapp's petition contains general statements concerning, for example, the railroad industry's unused capacity; PRR's $750 million losses from passenger operations over the past 15 years; the $1 million lost by PRR and the $400,000 lost by NYC from railroad operations during 1964 even though their systems realized overall profits because of nonrailroad activities; the applicants' poor return on investment compared to the returns of other industries, with their consequent difficulty in obtaining new investment money for equipment and better service; and their prospective loss of around $30 million in business to N&W and C&O-B&O in 1965 with probable loss of $50 million to those systems in 1966 unless the merger is consummated.

In specific reference to New Castle's interests, the speaker pointed to PRR's present lack of capital sufficient to provide the transportation New Castle and the surrounding area of Pennsylvania requires; the dropping of their original opposition by the

[5] By telegram of December 28, 1965, the mayor of New Castle stated that the city council by formal action, after deliberate and diligent research, unanimously withdrew opposition to the merger and expressed its opinion that it would be to the best interest of the city if approval of the merger were granted. This telegram was followed by a letter on December 31, 1965, from the city solicitor requesting permission to withdraw the city's opposition to the merger for the reason it no longer cares to object.

major cities of Pennsylvania, the Delaware Port Authority and the Port of Philadelphia; the necessity for the applicants to build up their business in Pennsylvania instead of reducing it; plans for continued use of PRR's huge modern $50 million classification yard at Conway, Pa., rather than downgrading it in favor of NYC's yard at Selkirk, N. Y.; the probability of the present volume of traffic continuing to move via PRR routes after the merger; the routing of about 85 percent of PRR traffic by shippers, many of whom can now route via NYC if they so desire; the lack of NYC capacity to handle large amounts of PRR traffic originating west of Columbus, Ohio; the offsetting of lower grades on NYC's longer routes from the west by the heavier locomotives now available on PRR's steeper but shorter routes; and the present lack of any real competition between applicants' routes into New York City, with PRR's principal competition there being provided by E-L to whose improved service PRR claims to have lost a great deal of business during the past year.

The speaker also referred to the possibility of the Transportation Company gaining a longer haul on certain import ores, and retaining for its own routes certain export grain now moving through the Port of Baltimore and handled via WM and NYC; and to the development of a European market for Pennsylvania coal which would be hauled to Atlantic ports by the Transportation Company.

Also referred to during the course of the speech were technological advances in the railroad industry since these proceedings were commenced, requiring the "two full books" of plans for their utilization.

The factual matter contained in the speech is generally in the same vein as that already of record, and thus would be cumulative of testimony already given. To the extent it tends to counter Shapp's arguments that the merger would be disasterous to Pennsylvania, its admission in evidence would be to his disadvantage.

In their report, the hearing examiners noted that it would be unrealistic to conclude that the merger plan as proposed at the hearing would be carried out in all its details exactly as then envisioned, and we would hesitate to approve the merger at all if we were not convinced the applicants recognize their responsibility to direct much of the savings they will realize into continuous improvement of operations and service to shippers. Furthermore, reopening these proceedings in every instance where the applicants

exercise their managerial discretion in handling and routing traffic would present an almost impossible administrative burden.

The decision in *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,* cited by Shapp, arose from a rate case closed by the Commission in 1928 (but in which the order had not yet become effective) where the Supreme Court of the United States held the Commission's refusal under changed economic conditions in 1931 to reopen the proceeding for rehearing was an abuse of its discretion. In the second of the cited authorities, *Interstate Commerce Commission* v. *Jersey City, supra,* the court pointed out that the *Atchison* case, was restricted to its special facts and, that, as an instance where the court reversed the Commission for refusal to grant a rehearing, it stood virtually alone in the history of administrative law. Also significant here is the court's observation that there would be little hope of ever consummating an order if litigants might demand rehearings because some new circumstance has arisen, some new trend observed, or new fact discovered. The two cited cases synthesized and applied to the facts here, provide authority for denial of the petition. Good cause for the sought reopening not having been shown, the petition is denied.

The jointly represented Pennsylvania localities oppose the merger as generally unwarranted, founded upon unrealistic projections of future national economic needs and growth, and destructive of competition.

No exceptions have been filed by the applicants. They indicate that, rather than risk delaying consummation of the merger, they will accept the conditions recommended by the hearing examiners to preserve competition and retain the present balance of railroad operations in the East. In passing, however, they complain that the conditions are onerous, far exceeding conditions imposed in any other consolidation proceeding, and that they will not only place heavy burdens upon the early stages of the merger but will also divert traffic to competing systems.

The applicants maintain that all of the eastern railroads are in accord on the need for major realignments in the territory and have not differed in their ultimate goals of improving rail service to strengthen the industry, curb traffic erosion, obtain financial strength to restore competition in the transportation industry, and enable the railroads to make a greater contribution to the national economy; even though they sometimes differ as to the best means of achieving these goals.

The applicants point to their own contributions to realignment of the eastern rail system, including: their support, as a matter of principle to the merger of The Delaware, Lackawanna and Western Railroad Company into E-L, authorized September 13, 1960, in *Erie R. Co. Merger*, 312 I.C.C. 185, despite grave concern for the traffic of their subsidiaries admitted by E-L to be subject to diversion by reason of its own improved service; PRR's active support on principle, and NYC's withdrawal of opposition to C&O's control of B&O authorized December 17, 1962, in *Chesapeake & O. Ry. Co.–Control–Baltimore & Ohio R. Co.*, 317 I.C.C. 261, although the transaction offered no advantage to either of the instant applicants; and in *Norfolk & W. Ry. Co. and New York, C & St. L. R. Co. Merger*, 324 I.C.C. 1,[6] approved July 24, 1964, PRR's making available its Sandusky branch line to N&W as the essential connection between N&W and Nickel Plate, leasing its subsidiary, the Wabash Railroad Company, to N&W to provide substantially all of the savings involved in the merger, and, to permit consummation of the merger, agreeing to divest itself of its $350 million investment in N&W stock which has many times in the past 60 years provided the PRR's margin of profit.

Recent Events Affecting Transactions

Before discussing the merits of the proposed merger, we believe it advisable to describe certain events occurring after the hearings, but, nevertheless, having a bearing on our decision. We take official notice of these events; and, any party challenging the facts set forth in connection therewith may proceed pursuant to section 7(d) of the Administrative Procedure Act.

N&W and C&O merger application.–On October 11, 1965, applications were filed in Finance Dockets Nos. 23832 and 23833 for authority to merge the C&O system into the N&W. A part of the application is an offer to include the systems of E-L, D&H, B&M, Reading and CNJ. This offer is conditioned upon (1) the enactment of Federal tax laws permitting the proposed N&W-C&O system to take advantage of operating loss carryovers of the included carriers; (2) a permanent solution to the passenger problems of the included carriers relieving them and their successor of any loss in performing commuter service; and (3) the maintenance of the financial positions of the included carriers

[6] Hereinafter called the *N&W* merger case.

without substantial adverse change during the pendency of the proceedings.

Petitions for inclusion in N&W system.—Prior to the filing of the N&W-C&O merger application, B&M on September 23, 1965, D&H on September 24, 1965, and E-L on September 28, 1965, filed petitions for inclusion in N&W as provided for in appendix O of the *N&W* merger case, *supra*. B&M asks that its petition in the *N&W* merger case be consolidated with the instant proceedings for decision, and D&H and E-L ask that, in this proceeding, notice be taken of the petitions in the *N&W* merger case.

N.H. Passenger Train Discontinuance.—On October 11, 1965, NH under section 13a(1) of the act, filed a notice in Finance Docket No. 23831 of its intention to discontinue all its interstate passenger trains March 1, 1966. We are entering a decision in that proceeding concurrently herewith.

Purchase of Long Island Railroad Company.—The State of New York has purchased from PRR for $65 million all of the capital stock of The Long Island Rail Road Company (LIRR) a wholly-owned subsidiary of PRR. Title to the stock is held by a newly organized governmental corporation of the State, known as the Metropolitan Commuter Authority, whose members are to be the directors of LIRR. As a result LIRR is no longer a member of PRR's system or a carrier whose properties and operations are directly involved in this transaction. It is an independent line primarily engaged in passenger transport. What limited freight it handles will, like that of BEDT, require an interchange on any through service performed in conjunction with the Transportation Company. The Authority intends to continue operation of LIRR in its present corporate form with direction and control thereof being exercised solely through ownership of stock and control of the board of directors.

As part of the transaction, LIRR conveyed its Bay Ridge Branch to the Pennsylvania Tunnel and Terminal Railroad Company, a wholly-owned subsidiary of PRR; and, to avoid dislocation of LIRR personnel and eliminate areas of possible labor controversy, LIRR will maintain and operate the branch for itself and for the account of PRR under a 5-year agreement with provision for a year to year extension thereafter. This branch extends about 12 miles from Bay Ridge on Upper New York Bay in a northeasterly direction to a junction at Fresh Pond with LIRR's Montauk division and with The New York Connecting Railway jointly owned by PRR and NH. Operations thereover are confined to freight movements, largely by

Connecting Railway under trackage rights to which the sale was made subject. Also purchased from LIRR was a portion of its Evergreen Branch extending 0.75 miles north from a junction with the Bay Ridge Branch to Palmetto Street. LIRR does not use this portion for passenger service and makes very little use of it for freight service.

Inasmuch as the Authority is not a carrier and did not then control any carrier subject to our regulation, its acquisition of LIRR's control through stock purchase did not require our authorization under section 5(2) of the act. On the other hand, the purchase of the Bay Ridge branch and the portion of the Evergreen branch from LIRR constituted a transaction subject to our jurisdiction under section 5(2), both vendor and vendee being carriers within the meaning of section 5. The purchase was authorized in Finance Docket No. 23956 by Finance Board No. 3, on January 19, 1966.

MERITS OF MERGER PROPOSAL

The merger will create an hour-glass shaped system flared on the east from Montreal, Canada, through Boston, Mass., to Norfolk, Va., and on the west, from Mackinaw City, Mich., through Chicago, Ill., to St. Louis, Mo., operating about 19,600 miles of interlaced road sprawling between the Great Lakes on the north (with some trackage in Canada) and the Ohio and Potomac Rivers on the south.

Its solicitation, sales and traffic force of almost 1,500 persons will have offices in all sections of the country and parts of Canada.

After the applicants expend about $75 million to connect their systems and provide new and expanded yards, the merger will permit the consolidation of trains now moving separately between the same points, the filling out of low-tonnage trains, and the use of the most favorable routes available to the applicants without intermediate yarding and reclassification. Operations under the merger will allow the movement of the largest amount of freight as far as possible without stopping. Terminals will be consolidated, interchanges between the applicants' systems will eventually be eliminated and the most efficient yards and facilities of the individual applicants will be used.

To realize their design for a modern railroad keyed to present-day service needs, applicants will undertake a program of extensive

capital improvements scheduled over a 4-year period. Through '98 planned projects they will intermesh their physical plants; renovate yards; improve roadway and track; install central traffic controls and generally improve signal, control and communication means; consolidate and modify certain maintenance facilities; and otherwise provide for the anticipated speed-up of trains and growth of business.

In outline, applicants propose to consolidate their long-haul traffic at key points, thereby making it feasible to conduct almost non-stop service by through trains between principal cities, while "locals" ply the multiple-stop routes and branch lines. By this means substantial savings can be made in transit time. For example, from Boston to Cincinnati time will be cut more than 27 percent from the time of either applicant's fastest trains today. From Buffalo to East St. Louis the time saving will be almost 36 percent; Cleveland to PRR's Greenville station in New York Harbor, 25 percent; Chicago to New York, 11 percent; Detroit to Jersey City, 26 percent.

Essential to the success of the plan is the remodeling and modernization of certain yard facilities: Selkirk Yard, just south of Albany, N. Y., will be able to classify 5,000 cars per day electronically. Here, through trains to the west will be formed, and through trains from the west will be broken up for direct dispatch of freight to terminals or consignees in New England, New York and northern New Jersey. Collinwood Yard at Cleveland will have the capacity to classify 3,000 cars per day; Englewood Yard at Chicago will be able to handle 3,200 cars per day in switching service. Sharon Yard at Cincinnati and Outer Yard at Toledo will be vastly improved, as will facilities at Indianapolis, Ind., Toledo, Ohio, Metropolitan New York, Buffalo, N. Y., where NYC has its electronically-controlled Frontier Yard with a capacity of nearly 6,000 cars; Detroit, Mich., where NYC maintains several yards having a total capacity near 10,000 cars; and others. Some New York City traffic could be routed over NYC's Hudson River East Shore Line to lessen costly car-float operations; and, where needed, carfloat will be handled through Greenville, Weehawken and Harsimus Cove, N. J.

By consolidating traffic on fast through trains, filling-out trains, minimizing handling and switching of cars and lading, rerouting over the most efficient routes, eliminating certain interchanges, applicants contemplate a 6 million-mile saving in train miles operated. This, combined with the transit-time savings described

above, will be the equivalent of substantially increasing the fleet of equipment available to shippers. At the same time applicants will be in better financial condition to acquire new, larger freight cars and specialized equipment to meet specific needs of certain shippers.

Shippers may expect numerous service advantages as a result of the merger. There will be single-line service between more points, with less route-circuity, less handling of freight, less switching of cars, and consequently less likelihood of damage, less time in transit and terminal, and easier tracing of shipments. Not only will applicants be able to offer shippers all the various kinds of equipment in their combined fleet, but also, by virtue of their monetary savings and improved financial situation as a result of the merger, they will be in a better position to augment the fleet with modern, more versatile and specialized equipment tailored to the specific needs of the shipping public. With this equipment more readily available across the merged systems and under unified control, applicants should be able to produce a more flexible car supply more closely attuned, time and location-wise, to the needs of commerce and industry in their area of service.

There is no question but that the transaction will permit more economical and efficient use of the applicants' transportation facilities. The economies realized through the merger operations will redound in large part to the benefit of shippers, and thus to the general public, either through the improved service thereby made possible or lower rates. For this reason the merger has met with the almost unanimous approval, in principle, of shippers throughout the Nation.

Shapp, however, finds most of the basis for his opposition in the very plans for improved service which shippers in general approve. His principal contention is that to the detriment of Pennsylvania, the applicants will use NYC's water-level route through Albany to New York City and Newark, N. J., for freight originating west of Columbus, Ohio, instead of PRR's route through Pennsylvania to Philadelphia. He also scores applicant's plan to spend in Pennsylvania only $4.75 million of the $75 million proposed for capital improvements and to use $2.75 million of it for expansion of repair facilities rather than for improvement of rail service. He contends that the proposed operation based on an improved yard at Selkirk, will divert from Pennsylvania to New York the general cargo and merchanise trains Pennsylvania needs if it is to attract modern industry.

With trains diverted to Boston and New York, the Port of Philadelphia, he says, will be badly hurt, and, with the freight service now routed between Pittsburgh and Erie being rerouted through Youngstown to the Port of Ashtabula, the northwestern extension of Pennsylvania would be crippled beyond any hope of redemption.

These views of the merger's effect upon Pennsylvania interests are considerably more direful than are the views of those interests themselves. As previously stated, both Pittsburgh and Philadelphia have withdrawn their opposition as have the Borough of Ambridge and City of New Castle, Pennsylvania, localities jointly represented at oral argument. The Commonwealth, at oral argument, no longer pressed, as it did on exceptions, for restrictions designed to freeze the applicants' service in Pennsylvania at present levels for eight years following the merger. Instead, it indicates approval of the merger, provided consideration is given to the effects upon secondary employment and the economy of Pennsylvania generally and safeguards are adopted for other railroads operating in the Commonwealth.

The applicants point out that their plan of operation would bring about very little reduction in train service in Pennsylvania. Out of 343 trains now operating in the Commonwealth on a typical day, 31 would be withdrawn; but 7 new ones would be added. Some diminution would occur to the extent the 31 trains have provided pick-up and set-off service at intermediate points which will not be served by the new trains. These points, however, would not be left without service, and every connection scheduled for any of the 31 trains withdrawn would be protected either by existing trains or by one of the 7 new trains so that in practically every case shippers would receive at least as good overall service as at present. Further, if traffic volume should warrant more service, the number of trains can be increased.

The contentions regarding the adverse effect of the merger on Pennsylvania's economy are not substantiated by the evidence. On this record, the prospects clearly import that the merger will benefit rather than harm the Commonwealth. It will assist in attracting new industries through the applicants' increased ability to meet the needs for specialized equipment, more adequate car supply, new land for industrial development, and expanded transit and stop-off privileges. It will open NYC marketing areas to Pennsylvania industries and will make available improved service from Pennsylvania communities to NYC points

in other States. The concentration of maintenance and construction operations in Pennsylvania should bring a net gain of employment to the Commonwealth, which, in the applicants' words, "will in effect become the workshop of the merged railroads." In addition, as hereinafter discussed, adequate safeguards will be adopted for the protection of other railroads in the Commonwealth.

Furthermore, the proliferation of transportation facilities is conceived, in today's regulatory plan, as the result of present or foreseeable future requirements of the "public convenience and necessity." While carriers do promote the development of industry along their routes and in their service areas, it is not intended that private enterprise be required to establish transportation means or maintain service where a need does not exist, merely in the hope that, at some (indefinite) future time, business and industry will locate and grow along those established routes. To be sure, there is an interplay between the existence of transportation and the growth of industry, but other factors, such as, proximity to market or raw materials, availability of suitable labor, and local taxation may be equally important or perhaps more so, in the selection of industrial and business locations.

Finally, with regard to the abandonment of lines, the applicants during the course of these proceedings have given repeated assurances that none will be sought by the Transportation Company as a consequence of changes in traffic flow brought on by the merger. The initial report contains an adequate discussion on this point at sheets 120 and 285–286, which we adopt. Such abandonments as may be sought would have to be brought under section 1(18) of the act, and none will be authorized unless permitted by the public convenience and necessity.

Much of the opposition expressed to the merger is occasioned by contradictory views on the applicants' financial position, on their prospects for continued profitable operation as individual systems and on whether the alleviation of their financial difficulties warrants any elimination of competition or worsening of other carriers' positions, which might result.

Our concern with the financial condition of carriers is primarily in connection with the administration of the law in accordance with the objectives of the national transportation policy, viz "developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." Without

financial well being, a national transportation system cannot long exist as a group of privately owned enterprises. The provisions of section 5(2) of the act do not require an applicant to show penury or danger of imminent bankruptcy before a transaction it proposes can be approved. The transcendent requirement is that it show the transaction to be consistent with the public interest; and this is the *sine qua non* under the criteria set out in the act.

The term "public interest" as used in section 5(2) has had the Supreme Court's attention on more than one occasion. It is not related to matters of public concern apart from the public interest in the maintenance of an adequate transportation system, but is used in a more restricted sense defined by reference to the purposes of the transportation legislation. See *United States* v. *Lowden*, 308 U. S. 225, 230 (1939), where the court said:

> public interest*** is not a mere general reference to public welfare, but*** has a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities. [Citing *Texas* v. *United States*, 292 U. S. 522, 531, and *New York Central Securities Corp.* v. *United States*, 287 U. S. 12.]

As a basis for studying operations for at least one decade prior to these proceedings, the hearing examiners selected the information contained in the applicants' balance sheets and income statements for the 12 years 1952 to 1963. Data for the year 1926 are used for long-term studies and 1947 data are used where consideration of the first post-war year divorced from actual wartime operations is a necessary base. Data for 1952 are used where no significant prior data were presented of record and 1961 information is used in preference to more recent data where it better relates to earlier information or where later information is not available.

It is contended by some that the hearing examiners' findings and projections on the basis of the foregoing data are based on unusual or abnormal years because 1926 was a peak year for traffic volume, traffic acquired by railroads during World War II had not yet reverted to other forms of transportation by 1947, 1952 was another peak year and preceded the 1953–1954 recession, while 1961 was a recession year. Therefore, they argue, these years neither adequately reflect past results of operating the applicants' systems individually nor project properly the prospective results of operating the merged system.

With this argument we do not agree. Any period long enough for a meaningful traffic study or financial analysis would be affected by some abnormal economic condition in the railroad industry. The year 1926 marks the end of a period of increasing railroad traffic, and is a logical take-off point for studying the applicants' long-term operations. The year 1947, as a post World War II year, provides data which we believe represent a reasonable compromise between the data of the war years when railroads handled traffic ordinarily handled by other modes and the data of later years when the other modes had captured traffic over and above that which might be expected to revert to them by reason of the cessation of hostilities. For a study of at least one decade's operations, we would be hard pressed to find in this century a period of 12 consecutive years less affected by war or depression-caused abnormalities than the 1952–1963 period chosen by the hearing examiners. All things considered, we believe that from the data available to them the hearing examiners have made a circumspect and wholly adequate analysis of the applicants' traffic and revenues.

We are aware that each applicant's financial situation has improved since the hearings ended. The Form A annual reports for 1964 and 1965, of which we take official notice, show PRR's net income at $29.133 million and $33.897 million, respectively, as compared to the $9.159 million for 1963 shown in appendix D–7 to initial report, and NYC's at $27,047 million and $41.519 million, as compared to the $7.04 million for 1963 shown in appendix E–7.

The Department and the jointly represented Pennsylvania localities argue to the effect that the present national growth rate is a permanent fixture in the nation's economy. Even accepting their projections, however, there is no assurance in this record that the applicants' prosperity will keep pace with that of the nation as a whole. Historically they have failed to do so. On past experience, as reflected in the record, the applicants and the Eastern District railroads in general have not reached the peak of the last previous national cycle of prosperity, and, cycle by cycle, they have not been reaching the top of the prior one, but have repeatedly been breaking the bottom of the prior one notwithstanding the strong and relatively persistent growth of total intercity transportation. Compare appendixes B, C, D, and E. It would be unwarranted to adopt interveners' argument that improved 1964 and 1965 incomes establish an unquestionable trend

toward permanent improvement in applicants' finances. Neither the 1964 nor 1965 incomes of PRR approach its 1956 income of $41.545 million or its $41.184 million realized in 1955; while the 1964 and 1965 incomes of NYC fall far short of its $52.284 million income for 1955. Yet we cannot say that 1955 and 1956 were more prosperous for the Nation than 1964 and 1965 have been.

Inherent in the railroad industry are a number of generally recognized advantages and disadvantages, prominent among which are the capacity (within certain limits) to substantially increase volume without a proportionate increase in cost, and the necessity to maintain a large fixed plant, whether volume is great or small. These features provide the leverage referred to in describing railroad securities. Because of this leverage, rail profits will tend to rise more sharply than costs as volume grows. On the other hand, when volume falls, costs do not drop proportionally; the plant merely stands unused and its attendant costs remain.

In modern times, for long periods, and more so than not, large percentages of the Nation's rail capacity has stood idle. The effect has been to put the railroads among the lowest of major U. S. corporate groups in terms of return on net worth. Among class I railroads in the 10 years preceding 1965, the rate of return on investment has averaged 3.01 percent ranging between a high of 4.22 percent in 1955 to a low of 1.97 percent in 1961. In 1964 the return rate was 3.14 percent. Both of the applicants have been continually below the averages.

Through merger or other forms of corporate affiliation the railroads are seeking, among other things, to prune the plant by eliminating unneeded, duplicative facilities, retaining that where there is an established or prospective need, and expanding where necessary to accommodate growing demand. In approving the PRR-NYC merger it is our purpose to open the way for the development of a modernized railroad system trimmed of unnecessary plant, unencumbered by service obligations no longer responsive to the public needs, and free and able to grow as and where the Nation's transportation requirements dictate. Mergers are not for shrinkage any more than the pruning of a fruit tree is for reducing the yield of fruit.

The examiners concluded that drastic relief was needed to arrest a trend which, over a period of time, could reduce the individual applicants to perilous straits. Parties who oppose this merger or seek to delay it point to an upswing in the applicants' operational and financial situations in 1964 and 1965,

arguing that the turn has been made and that both the Nation's economy and the affairs of the applicants are on a long-term upward trend. Certain of the same parties also criticize the examiners not only for use of the 12-year period 1952-63, in making income comparisons; but also for failure to give sufficient weight to the improvement in applicants' results of operations after 1963, and for exclusion in some comparisons, of income from other than investments in transportation property, stating, among other things, that the sources of applicants' income are irrelevant to the question of whether the merger is in the public interest.

It is argued that the American economy has entered a new era in which business is no longer susceptible to the traditional rhythm of expansion and recession. In view of the optimism occasioned by five years of continuous business growth we deem it prudent to take a somewhat longer look at economic history.

As a matter of fact, 2 1/2 years has been the average for all U. S. business expansion for more than a century. While the current upswing may be considered the longest peacetime expansion in American history, it is still over a year and a half short of the 80-month business rise of 1938-45.

Since World War II business fluctuations either in duration of time or extent of fluctuation have not been evenly rhythmical. The shortest period of business expansion was 25 months (1958-1960) and the longest (before the present upward cycle) was 45 months (1949-1953). The low point in the recession immediately preceding the present upward cycle was reached early in 1961.

We recognize, as do certain protestants, that economic growth has become an increasingly important function of government policy. However, it is generally recognized that there are strong forces, domestic and international, that defy control, and we still must be aware of the probability of economic imbalance and recession from time to time. Counsel for applicants stated at the oral argument, "I don't believe that the Commission should in its deliberations * * * assume that the cyclical law of economics has been repealed in this country." We make no such assumption. Any far-reaching decision must take into account the several contingencies; and a decision such as this, aimed at the objectives of the national transportation policy, and affecting a very substantial part of the Nation's future transportation, cannot, in reason, be reached with eyes closed to the very real danger that our economy may

not always be as active and healthy as it is today. Even an expanding economy pauses occasionally to consolidate the gains of past growth.

Furthermore, we are dealing here with a cyclically sensitive industry. Railroads generally are among the industries first to suffer loss of income in periods of business recession, and historically they have found it difficult to quickly effect reductions in operating costs to match declining revenues, principally because of the aforementioned disadvantages inherent in the railroad industry. A general economic recession is not necessary, but merely a slow-down in the rate of expansion, to trigger a cut-back for railroads. For in addition to their own inherent sensitivity, the railroads rely upon other sensitive industries, viz., coal and steel, as a principal source of revenue.

Appendix F hereto sets forth the sources of applicants' income during the 5-year period 1960-64, which embraces the most recent business recession (1960-1961) and reflects the upward trend since that time through 1964. This appendix shows that in none of the 5 years did NYC have sufficient net railway operating income to meet its fixed charges and in only one year (1964) did PRR have net railway operating income high enough to meet its fixed charges. Both applicants suffered deficits in net income in 2 of the 5 years. This appendix further shows that if net income is adjusted to exclude income from investments other than investments in transportation property (total other income less miscellaneous deductions) deficits would result for each year for both PRR and NYC. Such deficits for 1964, a relatively prosperous year, would be approximately $1,190,000 for PRR and $437,000 for NYC. This means that on the basis of their railroad operations alone, in a year when the national economy was approaching records for sustained expansion, these two railroads did not make a profit. Some perspective of the railroad situation may be seen in the fact that while the Nation's industrial output doubled since 1947, the revenue ton-miles of class I railroads exceeded the 1947 peak by less than one percent in 1964. Applicants' intercity revenue ton-miles failed, even in 1965, to reach the 1947 high point. Compare appendixes D and E.

This merger may be approved if it is consistent with the public interest. It is not a legal requirement that a drastic need, or any need, for relief be present. It is not a legal impediment that the merger candidates find business good. Regardless of these particular circumstances, if the merger is in the public interest, the applicants have a right to our approval of it.

Of greater concern to us, and in our opinion more worthy of serious consideration than the increased incomes enjoyed by the applicants since the close of the hearings, is whether the return they receive for capital expended is sufficiently attractive to insure their continued efforts toward improving railroad service, providing jobs for their employees, and discharging their transportation obligations to the public.

As the hearing examiners point out, public policy inhibits the free functioning in public utility industries of the principle that high returns induce investment while low returns induce disinvestment. However, even as components of a regulated industry, railroads must offer returns high enough to attract the capital needed to keep their service competitive with other modes of transportation requiring less capital investment. The applicants' competition for investment capital is not limited to that of other railroads.

Notwithstanding the relatively high levels of business activity in 1964 and 1965, and applicants' improvement in revenue and net income, the fact remains that even in this economic climate PRR had a rate of return on net investment in transportation property of only 1.77 percent in 1964 and 1.91 percent in 1965; and NYC's return rose to only slightly above 2 percent in 1964 and to 3.01 percent in 1965. The rate of return on net worth (shareholders' equity), which embraces non-transportation investments, for PRR was 2.08 percent in 1964 and 2.42 percent in 1965; and on the same basis NYC had a return of 2.88 percent for 1964 and 4.43 percent for 1965. However, these rates of return, unusually high for the applicants in recent years, are still lower than practically all of those for 73 industrial groups as shown in the initial report's appendix F-2. Even non-risk government securities shown in appendix F-1 (initial report) yielded 3.95 percent in 1962, a year when both applicants' rates of return on net assets were negative. Currently the yield on United States Treasury bonds is in excess of 4.5 percent.

In a free enterprise economy, the return on investment determines where money shall go and where it goes depends, risk considered, on where it gets the best return. Attention is called to recent investments by railroads in pipeline, land, chemical, and electric companies. More and more of this type of investment can be expected, if adequate returns are not realized from funds invested in railroad operations.

A recent example of a large scale disinvestment of funds that could have been reinvested in railroad properties and operations is the Chicago and North Western Railway Company's purchase of a chemical company for $90 million. As reported,[7] the railroad paid $27 million, issued securities in the name of the chemical company for $63 million and acquired a corporation whose 1964 pre-tax income was $9,675,000, and whose income for the five years ending in 1964 amounted to approximately $10 million annually.[8] The transaction required no authorization from us. In contrast, PRR received an average annual net income for the 10 year period 1955–1964 of only $14.3 million on assets worth $2.28 *billion*, while NYC with assets worth $1.76 *billion* received an average net income over the same period of only $13.1 million.

We would not expect the applicants or any major railroad to immediately begin a decisive withdrawal of funds from transportation properties for investment in other enterprises, but if the present low return trends were permitted to continue, significant withdrawals would become more and more attractive.

Certain of the protesting parties also point to the large nontransportation investments made by applicants in the recent past and assert that the availability of funds for such investment does not indicate dire financial straits. One answer given is that in a free enterprise system, management is expected by stockholders to place available funds in investments that will bring a rate of return commensurate with the risk involved. Applicants' managements have made such nontransportation investments (as have other railroad managements), to offset the low return on investment in transportation property and because such action was dictated by their experience in business recessions since World War II, at which times applicants' income from nontransportation investments made the difference between loss and profit. In the case of NYC, such "other income" was possibly the final bulwark against insolvency.

Since 1952, applicants' rates of return have been too low to generate confidence in their financial soundness, to maintain credit, and to raise funds necessary for the discharge of their public duties. That this is so is clearly demonstrated by a number of telling facts of record. For example, it was shown that only 12 percent of PRR's bonded debt, and even less of NYC's obligations,

[7] *Traffic World* of June 19, 1965, page 20.

[8] Hearing examiner's recommended report and order in Finance Docket No. 23388, Chicago and North Western Ry. Co. and Chicago Great Western Ry. Co. Merger, sheet 8, served March 5, 1966.

are of "investment caliber" according to the principal securities rating services. NYC had to resort to a Government-guaranteed loan under part V of the act for funds, because reasonable interest rates were not available to it on the open market.

Working capital is one of the gauges used by financial analysts in appraising a business enterprise and its securities. It is represented by the excess of current assets over current liabilities and is that part of the capital held relatively liquid and available to meet the demands of the ordinary business cycle. The payroll is an example of the periodic cash demands which must be regularly met. That item alone is in the order of $37 million a month for PRR, and like many other regular cash demands, is relatively unresponsive to business cycle fluctuations.

In 1963, PRR's working capital fell to $31 million, from as high as $151 million in 1952. Even with the recent improvement in the rail situation, PRR's working capital remained at a low of $33 million in 1964 and rose only to $48.4 million at year-end 1965. NYC's working capital situation is worse. From a $3 million deficit position in 1963, it went to $7.9 million in 1964 and $23.9 million in 1965—still far below the $44 million mark of 1955.

With average monthly operating expenses (less depreciation) running over $50 million for PRR and about $40 million for NYC, it is plain that these carriers have been operating from a working capital position generally considered to be short of normal requirements. It may be that PRR and NYC have attained a sophistication which enables them to minimize their commitment of capital to "current assets". Nevertheless, the financial community in general looks upon working capital as one of the signs of financial strength or weakness.

Low rate of return, low ratings on bounded debt, low working capital, resort to Government-guaranteed borrowing—these are among the indicia through which the applicants are regarded by the financial community.

We believe that with approval of this merger many problems facing the applicants will be resolved to a considerable degree. Applicants have shown that their annual savings from the merger will exceed $80 million after about 8 years. See pp. 131-155 of the initial report. These large operating savings will go far toward compensating for the persistently low rates of return, and the increased earnings flowing from the merger should motivate the unified company to accelerate investments in transportation pro-

perty and continually modernize plant and equipment. This in turn should enable the unified company to more fully develop and utilize the inherent advantages of railroad transportation in the territory served, and provide more and better service, all to the ultimate benefit of the public.

The Department insists that applicants exaggerate their financial and operating difficulties and that their merger would be contrary to the public interest. In its opinion, the Eastern District should have four systems: PRR, N&W, C&O-B&O, and NYC; and it contends that, if the time came when the four systems could not be supported by the traffic available, then PRR could be consolidated with N&W, and NYC with C&O-B&O. (In the N&W-Nickel Plate merger, it urged that the PRR should be required to divest itself of all interest in the N&W.) Under its four-system plan, among other things, C&EI would be included in NYC even though the former's control by the Missouri Pacific Railroad Company has been authorized in *Missouri Pac. R. Co.–Control–Chicago & E. I. R. Co.*, 327 I.C.C. 279, on February 16, 1965; and NH would be included in N&W despite the unsatisfactory routings which would result. The B&P Minority Interests also urge the establishment of the same two-system Eastern District.

The Department submitted no evidence in support of its four-system plan, but only an opinion that it is preferable to the consolidated rail systems that have emerged in the East. The plan which applicants have placed before us may indeed not be the best conceivable; but we cannot, by denying this application, or by any other means, compel the eastern railroads to cast themselves in the Department's mold. Our jurisdiction under the act of 1940 is limited to approving those alignments entered into voluntarily by railroads, and shown to be consistent with the public interest, subject to such terms and conditions as we find necessary. Neither the four-system nor the two-system plan advocated by the Department has been placed before us by the carriers concerned, thus making it pointless for us to speculate further on this record as to their desirability or practicability sometime in futurity. See *Broth. of Maint. of Way Employees* v. *United States*, 221 F. Supp. 19, 29-30; affirmed, 375 U.S. 216 (1963), sustaining the Commission's decision in *Chesapeake & O. Ry. Co.–Control–Baltimore & O. R. Co.*, 317 I.C.C. 261, 264-265.

Beyond these matters, the Department and other intervenors lay great stress upon the competitive effects of these transactions. Although modifying its earlier position of outright opposition to

one recognizing that conditional approval may be justified, the Department expresses alarm at the dominance which the Transportation Company will acquire in the Eastern District as a result of the merger. The issues thus raised make it necessary to preface our evaluation of this merger with a discussion on the significance of competition under the standards and policies expressed in the applicable law.

Under section 5(2) of the Interstate Commerce Act, a merger is lawful if, subject to appropriate conditions, it can be found consistent with the public interest. In evaluating merger proposals, our task is "to enforce the Interstate Commerce Act and other legislation which deals with transportation facilities and problems," for such legislation "constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of [our] action." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80. (1944).

In tracing the development of the applicable law and the special policies embraced therein, we must begin with the important and fundamental changes in policies toward railroad consolidations and railroad competition wrought by the Transportation Act of 1920. Prior to that enactment, there existed a stringent policy against railroad consolidations as evidenced by the rigorous application of the antitrust laws to several such transactions. Cf. *United States* v. *Union Pacific R. Co.*, 226 U.S. 61 (1912); and appendix to *St. Joe Paper Company* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 315-21 (1954). That policy sought to preserve competition and was based on an irrebuttable presumption that competition would engender improvement in transportation rates and service. Inquiry into the actual effect on transportation was not necessary. See *United States* v. *Southern Pacific Co.*, 259 U.S. 214 (1922).

By the act of 1920, Congress placed the role of the antitrust laws in a different light. Consolidation of railroads in the interest of economy and efficiency was established as a national policy. The basic reasons for the development of this special Congressional policy was explained by the Supreme Court as follows in *Schwabacher* v. *United States*, 334 U.S. 182, 191-93 (1947):

> *** the stress and strain of World War I brought home to us that the railroads of the country did not function as a really national system of transportation. That crisis also made plain the confusions, inefficiencies, inadequacies and dangers to our national defense and economy flowing from the patchwork railroad pattern that local interests under local law had created.

The demand for an integrated, efficient and coordinated system of rail transport, equal to the needs of our national economy and defense, resulted in the Transportation Act of 1920. In a series of decisions on particular problems, this court defined the general purposes of that act to be the establishment of *a new federal railway policy to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the interest of the public.* The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the *public interest in an efficient transportation system.* [Emphasis added.]

* * * * * * *

By 1940 it had become apparent that the ambitious nation-wide plan of consolidation was not bearing fruit. *** waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements. The Transportation Act of 1940 relieved the Commission of formulating a nation-wide plan of consolidations. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness. *** This court has recently and unanimously said in reference to this act, "Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind." *Seaboard Air Line R. Co.* v. *Daniel*, 333 U.S. 118.

Further elucidation on the purpose of the Transportation Act of 1940 was given by the Supreme Court in *County of Marin* v. *United States*, 356 U.S. 412 (1957), wherein at pages 416 and 417 it said:

The congressional purpose in the sweeping revision of §5*** in 1940, enacting §5(2)(a) in its present form, was *to facilitate merger and consolidation in the national transportation system.* [Emphasis added.]

* * * * * * *

the result of the Act [of 1940] was a change in the *means*, while the *end* remained the same. The very language of the amended "unification section" *expresses clearly the desire of the Congress that the industry proceed toward an integrated national system* through substantial corporate simplification. Subject to approval and authorization of the Commission, §5(2)(a) makes lawful the consolidation or merger of two or more carriers [Emphasis added.]

The major goals of the antitrust laws are to preserve the independent competitive status of individual firms and to curb the undue concentration of the American economy without any special regard for the effects of this policy in a particular industry. Cf. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 316–23 (1962); *United States* v. *ALCOA*, 377 U.S. 271, 279–80 (1964). By contrast, in the transportation industry which is subject to extensive economic regulation, the worth of competition and not merely its preservation must be considered within the regulatory scheme enacted by Congress. The very fact that Congress has seen fit to enter into the comprehensive regulation of transportation contradicts the notion that competition is favored without qualification. Federal legislation affecting railroads is one of many areas of economic activity in which serious inroads have been made on an original policy favoring competition. *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 92–93 (1952). It is only in a blunt, undiscriminating sense that we can speak of competition as an ultimate good. *Ibid.* 92.

Today competition is but one of several important factors to be considered in determining the public interest and applying the national transportation policy. If the transportation service likely to result from a proposed transaction will be adequate, economical, efficient, and if applicants will provide appropriate transportation facilities and make the best use of them; the public interest will be served, even if it means some competition will be eliminated. See *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25 (1932). Whether preservation of existing competition aids in the attainment of the objectives of the transportation legislation and its policies depends upon the facts in particular situations. Important facts and circumstances regarding competition in this proceeding differ from those involved in Finance Docket No. 21478, *Great Northern Pacific & Burlington Lines, Inc.–Merger–Great Northern Ry. Co.*, decided March 31, 1966.

The distinction between the policies embodied in the Interstate Commerce Act and those embodied in the antitrust laws was early recognized by the Commission, when, in 1923, it approved a railroad intercorporate control application only 6 months after the Supreme Court had held the transaction illegal because violative of the Sherman Act. See *United States* v. *Southern Pac. Co.*, 259 U.S. 214 (1922), and *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508 (1923). In the court proceeding,

begun prior to the 1920 transportation enactment but not finally concluded until 1922, Southern Pacific's acquisition of control of Central Pacific was held to constitute a combination in restraint of trade and a tendency toward monopolization. When the carriers later brought their application before the Commission under section 5 of the Transportation Act of 1920, the Commission recognized "***as settled, the fact the relation dealt with *** was in violation of the Sherman Act ***;" but it went on at page 516 of its report to explain that:

> While the Sherman Act has not been repealed, carriers affected by any order made by us *** [under section 5] are relieved from its operation. How far our discretion in any particular case should be influenced by consideration of the evils which the Sherman Act was designed to prevent is a question necessarily involved in every case where a carrier seeks to acquire control of a competing line.
>
> * * * * * * *
>
> Evidence as to public benefits to be derived from common control of competing carriers which would be immaterial in a prosecution under the Sherman Act, might be entirely appropriate in a proceeding before us under [section 5(2)]. There is therefore a dissimilarity of issues and in the nature of the proceeding***

By the same token, evidence addressed to the issue of whether a proposed transaction would violate the antitrust laws is not decisive, when approval of the transaction is being sought under section 5. That much is made clear in the *Seaboard* case, *supra*, 382 U.S. 154, where the Supreme Court held that, in a section 5 proceeding, there is no requirement that we determine whether the antitrust laws would be violated.

This does not mean, however, that evidence regarding competition is to be treated lightly. Competition can be a powerful force for reducing the price and increasing the quality of transportation. Of this we are continually made aware through the thousands of proceedings brought before us each year in the areas of rates, practices and licensing. But too many qualified competitors with an overabundance of transportation facilities can produce an undesirable effect. That is precisely one of the reasons legal limitations have been placed upon the extension of rail lines and the entry of for-hire carriers into the field of interstate commerce. Except where statutory exemptions exist, the introduction of additional competitors or the extension of rail lines

must have our approval, which can be given only upon a finding that the new competition, i.e., the new service, is *required* by the public convenience and necessity, at present and in the foreseeable future. History has shown that too much competition can have effects no more to be desired than the effects of too little competition.

Significantly, Congress chose to specify in section 5(2) a number of matters we are required to consider in passing upon a transaction; but competition is not among them.[9] The things specified are framed in terms of effects on transportation service and the Nation's transport needs, thus indicating the Congressional concern for ends rather than means.

Our examination of competition, therefore, is of its capacity as a means, not an end. Under the rule established by the *McLean* and *Minneapolis* cases consideration must be given to the scope and effects of the curtailment of competition, and of the public benefits to be derived from the merger, in determining the latter's consistency with the public interest and the national transportation policy.

The mandate to the Commission with regard to the antitrust laws and their policies favoring competition is clear. Section 5(11) of the Interstate Commerce Act specifically relieves carriers "from the operation of the antitrust laws and of all other restraints, limitations and prohibitions of law * * *" as necessary to effectuate a transaction approved by the Commission. This provision gives the Commission exclusive and plenary power as to carrier consolidations. In empowering the Commission to approve mergers, Congress "did not import the general policies of the antitrust laws as a measure" of such authorization. *McLean Trucking Co. v. United States*, 321 U.S. 67, 85 (1943). To do so, would permit only those mergers which do not offend the antitrust laws, thus rendering section 5(11) meaningless and ignoring the fact that the Interstate Commerce Act is "to be administered with an eye to affirmatively improving transportation facilities, not merely preserving existing arrangements or competitive practices" *Ibid.*, 86. The Commission is, however, obliged to:

> estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, et cetera, to determine whether the consolidation will assist in effectuating the overall transportation policy. *McLean, supra*, 87.

[9] Except in the proviso of 5(2)(b) where it refers to a rail-motor carrier affiliation.

In carrying out this obligation, we are to accommodate the policies of the antitrust laws with the policies of the Interstate Commerce Act which constitutes the immediate frame of reference within which the Commission operates. *McLean supra* at 79–80; *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 186 (1959).

Since an appraisal of the competitive effects of the merger must be made, interveners, not including the Department, took the position that we are required to make specific findings regarding section 7 of the Clayton Antitrust Act (15 U.S.C. Sec. 18) in the manner specified by the special United States District Court for the Middle District of Florida on May 13, 1965, in *Florida East Coast Ry. Co.* v. *United States*, 242 F. Supp. 14, in annulling and setting aside our order in *Seaboard Air Line R. Co.–Merger–Atlantic Coast Line*, 320 I.C.C. 122. In *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, however, the Supreme Court vacated the judgment in the *Florida East Coast* case, remanding the matter to the lower court for a full review of our order and findings pursuant to the standards enunciated in *McLean* and *Minneapolis*. In its *per curiam* order the court stated:

> We believe that the district court erred in its interpretation of the directions this court set forth in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1945), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959). As we said in *Minneapolis* at 186:
>
> Although sec. 5(11) [of the Interstate Commerce Act] does not authorize the [Interstate Commerce] Commission to 'ignore' the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standard of the antitrust laws.' 321 U.S., at 85–86. The problem is one of accommodation of sec. 5(2) and the antitrust legislation. The Commission remains obligated to estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy. 321 U.S., at 87.
>
> The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be consistent with the public interest. 54 Stat. 908. 49 U.S.C. sec. 5(a)(b) (1964 ed.)

Thus the effects of a proposed merger on competition are not required to be adjudged in strict accordance with the pattern developed in antitrust cases; that such curtailment of competition as might result, is to be appraised within the contexture of the public interest in transportation and not merely in terms of competition per se; that *Brown Shoe Co. v. United States*, 370 U.S. 294, cited by one of the protestants as the decisional formula, is not applicable here.

It was the *Brown Shoe* decision which prevailed upon the lower court in the *Florida East Coast* case to rule that criteria other than those set out in *McLean Trucking* and *Minneapolis, supra*, were to be employed in section 5 merger cases. That court noted that in *Minneapolis* "the Supreme Court did not expressly direct the Commission to define the relevant market by delineating a service market and a geographic market," and it noted further that *Brown Shoe* was the more recent of the two decisions. From this the Florida court concluded that "in *Brown Shoe*, the Supreme Court set forth directions for measuring the relevant market within which the anticompetitive effects of a merger are to be judged."

Out of this conclusion grew the district court's holding "that the Commission must define the 'line of commerce' and 'section of the country' in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger 'may be substantially to lessen competition' or 'tend to create a monopoly.'"

We know now that the district court in *Florida East Coast* erred in its interpretation of the Supreme Court's directions. However, the Supreme Court's decision does not preclude us from measuring the competitive consequences of a proposed rail merger by transportation standards which may or may not overlap the market criteria employed in antitrust cases.

Competition should be viewed in terms of localities or geographic areas of commercial significance in relation to which the merger applicants are in competition with each other in providing origin, destination or bridge service. Our analysis on this basis reveals the effects of the curtailment of competition upon shippers and shipper interests who today have a choice between PRR and NYC; and upon other carriers which today join with either applicant in through routes and joint rates in competition with the other applicant. As part of the analysis, inquiry is made into the substitutability of other modes of trans-

portation, and hence, the capacity of other modes to fill the resultant void in competition. The capacity of other modes to handle particular commodities economically in a competitive service and the availability of such capacity to the applicants' shippers become relevant.

An additional inquiry is made into the effects upon other railroads, not only as to the *curtailment* of competition between applicants on their present routes, but also as to the *increased* competition the strengthened applicants will be able to exert against their present rail competitors, and even against their present connections. On this point, section 5(2)(c) requires us to give weight to the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved, and that aspect of the case is dealt with, infra, under a separate heading.

Since the applicants participate in the transportation of practically the entire gamut of commercial commodities, originating and terminating in virtually all sections of the country, and at overseas points as well; and since other modes of transportation are competitive with applicants, at least to some extent, both as to geographic points and areas affected and range of commodities; the pattern of analysis used in antitrust cases would be difficult to apply here because of the essential difference between transportation and other industries as more fully discussed at pages 160–165 and 179–195 of the initial report.

Provisions of the act requiring railroads to interchange traffic and equipment with connecting lines have served to create a vast integrated network of railroad through which a shipper at any locality can gain delivery by railroad at practically any other locality in the country. In addition, for shipments over a substantial distance, there are usually a number of generally parallel rail routes capable of adequate service. Consequently, though the applicants are physically in the Eastern District, they are part of an interwoven nationwide system, and as such, handle not only intradistrict traffic, but also that flowing to and from points beyond the district. Their substantial concern for the latter traffic is evident from the fact that the Transportation Company will have solicitors and offices in all parts of the Nation.

Thus, while railroads do compete vigorously against one another, there are elements built into the law which, for the sake of better service, curtail competition to some extent.

For example, railroads are required by law to join with one another as partners in the interchange and movement of traffic anywhere on the national system; on multiple-carrier through routes, a constituent railroad cannot as a rule refuse to interline traffic nor may it discriminate among its connecting carriers on such routes; and without regard to the carrier's competitive situation, the shipper, subject to such reasonable exceptions as this Commission may prescribe as provided by section 15(8), has the right to direct the routing of his shipments. It has been estimated that about 85 percent of rail carload traffic moves under shipper-routing instructions.

The factors which influence a shipper in selecting a rail route are many and sometimes nebulous. It is quite clear from this record, however, that some of these factors are not directly related to carrier competition. For example, a shipper (or consignee) with physical access to only one railroad, even though in a city served by several railroads, is to some extent a captive of that one railroad. In point are the situations at Fort Wayne and Pittsburgh discussed at sheets 162 and 164 of the initial report. Among other factors not necessarily or primarily related to carrier competition—because they are incidental to a route and not usually within carrier control—are changing market demands, the location of processing or fabricating plants where the shipments must be stopped in transit, or the location of stop-off points where the shipment must stop for completion of loading or partial unloading. There are of course a number of things responsive to competition which influence the shipper: rates, service, availability of equipment, dependability, transit time, incidence of damage—all variables which go to make a carrier or route more or less competitive with others.

The shippers' designation of a route governs to a large extent a bridge carrier's participation in overhead traffic; and this explains in part why a railroad will maintain a solicitation force outside its territory. Because of the indeterminates and variables involved in shipper-routing and shipper loyalty to certain routing, it is not possible to accurately foresee how a proposed intercarrier affiliation will affect participation in overhead traffic. This much can be concluded with relative certitude, however: For long-haul traffic between almost any 2 areas of the country, there is usually a sufficient choice of routes to insure the presence of effective competition. But see *Great Northern Pacific & Burlington Lines, Inc.–Merger–Great Northern Ry. Co., supra.*

The merger proposed herein will, without a doubt, lessen railroad intramodal competition to some degree; but it will also increase such competition in some respects. Following the analytical process discussed above, we shall appraise these competitive effects and set out our terms for conditioning them as necessary to make this transaction consistent with the public interest.

The Eastern District has, at this time, an over-supply of rail facilities inasmuch as the total volume of rail traffic in the district does not adequately support the existing railroad plant regardless of how the traffic may be apportioned or diverted from one railroad to another. This is well borne out by the very poor rate of return experience of the Eastern District line-haul railroads involved in this proceeding: Reading, CNJ, NH, B&M, E-L, and NYS&W, all perennial losers prior to 1965, and even in that year some could not turn a profit; D&H, which produces a regular but small income; and the applicants themselves who have climbed from a deficit rate of return to a meager rate in the past two years.

On essentially rail-oriented traffic, those shippers who now may choose between PRR and NYC will find that choice gone. As to this relatively small area of traffic, the examiners concluded that applicants do not presently achieve the goals of competition under the antitrust laws, i.e., maximum service at minimum cost; that both applicants have been forced at times to reduce service, and that their rate reductions have been made possible by managerial policy, intermodal competition, and technological improvements more so than by rail competition. (See the discussion at sheets 421-423, initial report). These conclusions are undisputed, and with them we are in full agreement.

Railroad competition will be diminished in that some shippers now served by applicants as competitors will have to rely solely on the Transportation Company for rail service. Of 883 urban areas (pop.2500 or more) served by PRR and/or NYC, there are 32 where applicants compete solely with each other for rail business. Twenty-four of the 32 have populations of less than 10,000; 29, less than 25,000; and 31, less than 50,000. Of the 88 large cities (pop. 50,000 or more) served by PRR and/or NYC or their affiliates, 58 are served also by the strengthened N&W or C&O-B&O systems, and should therefore find the rail competition increased. Twenty-one others are served directly

or through connecting class I railroads with one or more of the 13 rail systems (other than applicants) considered generally competitive in the east. For a more detailed description of the point and area rail competition, see sheets 170–174 of the initial report.

The presence of both applicants or their affiliates at a particular point or area does not connote a totally competitive rail situation, however; for as between them, and between each of them and other carriers, there is today of necessity in providing the service directed by shippers substantial cooperation. Notwithstanding their location at 160 common points or junctions and their substantial amount of parallel trackage and routes (see exhibit H–1 and sheets 176–177 of the initial report), applicants have provided each other with a large volume of traffic. In every year 1952–1962, PRR interchanged more traffic with NYC than with any other single railroad.

Competition is further diminished at the common points by physical limitations. At 72 of the 160 common points or areas either physical connections or switching or interchange arrangements are lacking. Consequently, at these places a shipper today has a choice between applicants only if physically located on the lines of both. Thus, the possibility of total, effective competition between applicants as to originating or terminating traffic exists at less than 100 places served in common, or about 3 or 4 percent of the 2816 "urban areas" in the general area where applicants operate.

As to those where applicants will provide the only rail service, shippers in general are not greatly concerned about that aspect, because they expect the merger to produce a better car supply and improvement in other services. Most of the 220 witnesses who appeared on behalf of the shipper interests were fully in favor of the merger or gave support under qualifications—such as protection of NH, B&M or E–L—which we believe are met by the conditions here being imposed.

Overhead or bridge traffic is that which a carrier obtains from *and* delivers to its connecting carriers. Since neither pick-up from shipper nor delivery to consignee is involved, competition for overhead traffic is not readily analyzed in terms of the common service points and other factors significant as to origin and destination service. All major eastern railroads maintain solicitation agencies at commercial centers beyond their lines for the purpose of attracting overhead business; but the

success of this effort depends to a great extent upon a carrier's ability to enlist other carriers in the formation of proficient through routes with competitive rates.

As described at sheets 165-169 of the initial report, there are essentially 13 railroad systems in the East offering single, joint and alternate competitive routes, each system competing to some degree with one or more of the others. The three large systems that would be in being following this merger (B&O-C&O; N&W; PRR-NYC) maintain a dense network of lines in all directions to accommodate overhead traffic via most major points and gateways west of a line through Buffalo and Pittsburgh; and, in conjunction with other railroads, east of that line as well. For example, N&W can join with E-L, LV, D&H and B&M, among others, in handling transcontinental traffic to and from the Port of N. Y. and New England; B&O-C&O can make similar connections. This feature is discussed at some detail in the initial report at sheets 174-175, 179, 305, 426-427, 429, 422-423.

The Department contends that competition will be eliminated on more than a million carloads of traffic per year. The reference is to overhead traffic, which constitutes about 15 percent of applicants' carload traffic. While it may be fairly concluded that applicants compete with each other on a substantial amount of overhead traffic, we are convinced that, because of the several factors discussed above, the lessening of competition as a result of the merger will not be unduly injurious to the public. The power of shippers to direct the routing, the availability of numerous routes in a dense network of interline routes, the influence of connecting carriers in preventing a deterioration in service on the joint routes in which they participate, the growing strength of the N&W and C&O-B&O systems, all stand to provide a check against any abuse of economic power by the merged applicants. In addition, we are prescribing conditions to maintain the stability and competence of alternate routes involving E-L, D&H and B&M.

The powerful and growing threat of intermodal competition is a further deterrent to the Transportation Company in the use of its size and strength in a manner not consistent with the public interest. It is obvious from the record that a large part of the competition for freight traffic in the Eastern District is intermodal and not confined to railroads. A certain amount of the applicants' competition comes from barge-lines but most is provided by motor carriers. There can be little doubt that

should the need—or opportunity—arise, other modes would quickly move in to take over much of the traffic now handled exclusively by rail. We need only look at the experience of the period 1956–60 when NYC saw its tonnage decrease in amounts ranging from 11.7 percent to 34.3 percent in the five I.C.C. commodity groups, while its revenues from such commodities decreased in amounts ranging from 8.8 percent to 26.1 percent. At that very time, motor carriers were increasing their tonnages of the same commodity groups between 6.4 and 49.6 percent and their revenues derived therefrom, between 12.5 and 40.5 percent. Of special significance is the fact that during this period class I motor carriers increased their revenues by 25.5 percent in the manufactures and miscellaneous group—generally high grade traffic providing the greatest return. In 1961 this traffic accounted for 93 percent of class I motor carrier volume.

Applicants' competition from water carriers, though not as pervasive as motor competition, is nevertheless substantial. Waterways surround and cut through the Eastern District, making water carriage directly available at most of the major commercial centers therein. Motor-water, rail-water and all-water routes are providing increasing competition, particularly on heavy-loading, bulk commodities such as coal, ores, iron and steel products and grain. Between 1950 and 1960 the annual volume increased from about 150 million tons to about 200 million tons on the Ohio River system, the Illinois Waterway and the New York Barge Canal System. The St. Lawrence Seaway, Mississippi River, Great Lakes and other waterways account for additional tonnage which, to a large extent, could be handled by rail, and by applicants in particular.

Pipelines provide service to all the major population centers and many of the smaller communities in the district. They dominate in the transmission of petroleum and natural gas and provide significant competition to the applicants in the sense that the products they carry compete at the market. The prime example is the competition between coal and oil, and as pointed out elsewhere in this report, this competition has been at the foundation of lower rates and improved service in rail transportation of coal.

If rail service were to deteriorate, be curtailed, or otherwise fall short of the public requirements, the way is clear for motor or water carriers to obtain the operating authority to enter the territory and fill the service gap. A railroad is not entitled to

absolute protection against the competition of other modes, particularly where its service fails to meet a public need. See *Schaffer Transportation Co.* v. *U.S.*, 355 U.S. 93 (1957). And once traffic is diverted to other means, and new traffic habits and customer relations are established, it is not easily regained. In our opinion, the applicants will not wish to run the risk of losing more of their vital traffic to other modes by permitting a deterioration of service on certain lines simply because of an absence of rail competition.

The initial report contains a generally acceptable discussion on intermodal competition, at sheets 179–195, leading to the conclusions that non-rail modes provide substantial but not complete competition to the applicants; that there now appears to be some not precisely definable traffic as to which the railroads' inherent advantages predominate; that much of this traffic is bulk, heavy-loading and low-rated; that, as to a large share of this traffic, shippers are in a position to deny the business to applicants by substituting transportation or product; and that, in view of the current revolution in transport techniques and uses, this bank of so-called rail-captive traffic is continually changing and eroding.

Added to these conclusions must be the supervailing considerations that this traffic, e.g., coal, is highly important to the applicants, as it is to other eastern railroads; and, as is the case with railroads generally, they are continually extending themselves in competitive efforts to retain it. The effects of intermodal and product competition upon this traffic are dramatically emphasized in any number of cases decided by this Commission in recent years. In *Coal from Ky., Va. and W. Va. to Virginia*, 308 I.C.C. 99 (1959), railroads inaugurated the annual volume basis for reduced coal rates proposed as the only practical means of forestalling the construction of a mine-mouth generating plant that would have substituted the transportation of electricity by high wire for the transportation of coal by railroad.

Sharply reduced coal rates and ingenious use of equipment were advanced by the railroads to meet the competition of water carriers and other fuels in *Coal from Southern Mines to Tampa and Sutton, Fla.*, 318 I.C.C. 371 (1962). *Coal to N.Y. Harbor Area*, 311 I.C.C. 355 (1960) involved rate innovations by railroads to fend off fuel oil competition when coal consumption in the port market area fell almost 31/2 million tons per year. Rates on rail grain were reduced as much as 60 percent in *Grain-Multiple*

Car Shipments South, 325 I.C.C. 752 (1965), primarily to meet motor carrier competition. When motor carriers, by use of highway rack-trailers, reduced the rail participation in the movement of motor vehicles from 75.6 percent to 8 percent, cost-saving techniques and devices were developed by the railroads to remain in the competition, and as a result, shippers have better service at lower rates. See *Motor Vehicles (Tri-Level Truckaway) From Flint, Mich.*, 323 I.C.C. 215 (1964), and *Motor Vehicles–Wayne & Wixom, Mich. to Milwaukee, Wis.*, 323 I.C.C. 266 (1964). Barge-truck and rail-water-rail competition provided the motivation for the all rail rate reductions on pulpboard in *Georgia Public Service Commission* v. *Bush Term. R. Co.*, 310 I.C.C. 225 (1960).

These cases illustrate the constant give-and-take in the intermodal competition for traffic of the type considered to be basically rail-oriented. Add to these competitive forces, private carriage—which has the capability of being extended to handle more commodities greater distances, particularly when the shipper is in periods of business contraction; and it becomes apparent that applicants, though merged, are not likely to relax their efforts to provide acceptable and adequate service to the public.

Following the merger, the applicants will no longer compete with each other in the New York port area. But the port will have the improved services of the Transportation Company and NH, and will still be served by E-L, Reading, CNJ (pooled with B&O in New York harbor operations) and LV (which the applicants agree to sell to C&O-B&O). Any shipper dissatisfaction with the Transportation Company's service could redound to the benefit of E-L and the other rail lines serving the port, provided those lines, by attractive rates and service, can keep the shippers from converting to highway transport.

At the same time, we must acknowledge that the maintenance of good service at reasonable rates require solid support from the shippers and equitable treatment from the port and other political entities which influence transportation. Railroads perform essential transportation for the New York metropolitan area in inbound carriage of foodstuffs and raw materials; outbound carriage of processed goods, and movement of import-export traffic; and are particularly relied on for the low-grade, high density traffic moving relatively long distances. They also provide daily transportation for almost 300,000 commuters. Yet, of the $1 1/4

billion invested by PNYA for the development of transport facilities, as of 1962, less than 1/2000 of it went for rail facilities. Almost 1,000 times as much was used for air terminals; and a similar amount, for bridges and tunnels.

It became apparent in the early 1960's that many railroads in the East were in near desperate straits as a result of which some State and local governments embarked upon railroad aid programs. In 1961, PNYA was authorized to issue $100 million in bonds for the acquisition of commuter cars for lease to carriers. NYC leased 53 of these cars in 1963. Between 1962 and 1965, PNYA expended $70 million for the purchase and improvement of the Hudson Rapid Tubes Corporation. At the same time the State of New York was investing $75 million in the LIRR acquisition and in establishing a metropolitan commuter transportation service (both in 1965), and has provided about $100 million in tax relief spread over the years since 1959. Although the substantial part of this aid by New York, and of certain other States as well, is directed primarily toward alleviating local passenger problems, it will no doubt have a general palliative effect upon the beneficiary railroads. Nevertheless, the problems of railroads serving the New York City metropolitan area remain formidable. As pointed out elsewhere in this report, even the extraordinary prosperity pervading the Nation's economy in general during the past several years has not enabled some of them to make a profit or recover from economic distress.

Until recently there was no significant abatement of State and local taxes levied on the railroads, despite general recognition that certain rail services are performed at a substantial loss; and even now a few parties are before us opposing this merger on the ground that it will eliminate sources of tax revenue. We believe a reappraisal by all parties concerned is imperative, so that the burden of performing nonprofitable, but essential rail service will not fall solely upon railroads already heavily laden with debt and business expenses which, in many cases, cannot be paid when due, and in other instances, can only be met through sale or further encumbrance of the business assets. By this merger applicants will eliminate competition between themselves, which, as to the New York Metropolitan Area, has not in a sense been healthy competition; and will be able to attain a state of efficiency whereby improved service at the Port, as elsewhere, should result.

It became apparent before the record was closed that new intramodal competitive forces were in the making in the Eastern District. C&O had assumed control of B&O, the N&W-Nickel Plate, et cetera, merger had been authorized, and action was being taken to implement the operational plans upon which the Commission had based its approval of those transactions. It was then, as it is now, too early to fully assess the effects those transactions have upon PRR and NYC. We can be reasonably certain, nevertheless, that applicants will face increasing competition from those two greatly strengthened rail systems. That would be inevitable, since applicants operate in much the same territory as the other two and serve numerous points in common with them. The examiners so found, and their finding is not disputed.

The applicants, merged, would have the resources to withstand the challenge of these new, vigorous systems; whereas alone and left with the handicaps this merger is designed to eliminate, they would have to vie not only with the newly reinforced rail systems and ever-growing intermodal competitors, but with each other as well. In view of their vulnerable and highly sensitive financial situation and their persistent incapacity to produce profits from rail operations—as we have found elsewhere in this report—we are convinced that applicants, if required to continue as independent lines, could not keep pace with their common carrier obligations, and neither they nor the public which depends upon them for service would benefit.

We do not mean to imply that merger is the magic touchstone of success—too many other elements are essential: research, progressive technology, salesmanship, alert management willing to face today's problems on a realistic basis, etc. But this merger will enable the applicants to more effectively handle the external pressures with which they must daily contend in fulfilling a large part of the requirements of the public convenience and necessity in transportation. The economies it makes possible can be converted into the greater return needed by the applicants to attract investment capital, to maintain and improve service essential in commerce and industry, to recapture diverted traffic and to avoid further loss of traffic to other carriers.

In our opinion the expectations of the supporting shippers will be met, for applicants are fully cognizant, as is the railroad industry in general, of the formidable intermodal competition actively engaged in seeking to divert their business. This is

so as to practically all commodities, and particularly as to commodities which bear the higher, more compensatory rates. In union, PRR and NYC will also be able to offer more vigorous competition to the enlarged N&W and C&O systems as well as to truck and barge lines; and this, in turn, should stimulate carriers of the several modes into improving service.

This record has been challenged as according insufficient consideration to the postal service and national defense. By directive of the national transportation policy we are to administer the act so as to satisfy the transportation requirements of those two national activities. No official responsible for defense or mail has raised the question, however. To the extent the Post Office and Defense Departments elect to use applicants' services in ordinary times, the benefits of the merger will accrue to them as to all users. To the extent the merger invigorates the applicants and, by reaction, stimulates their competitors, the Nation's transportation system will grow that much more capable of withstanding the extraordinary stresses of war or other national emergency. Nothing material of record supports a conclusion that the merger will make the transportation system any less able to serve the Nation's mail or defense needs.

With the conditions in the initial report as augmented and modified herein, we find the applicants' merger and securities proposals to be consistent with the public interest.

Divestiture of P&LE.—The requirement set out in item 13, appendix U of the initial report that in the Pittsburgh District applicants are to arrange for reciprocal switching with other willing carriers will protect the area's shippers from adverse effects of the Transportation Company's control of P&LE. Since PRR and P&LE now dominate in the district, the inauguration of reciprocal switching should open the way for competition that does not now exist.

The Department advocates the divestiture of P&LE from applicants if the merger is approved so that it could be purchased by another system or operate independently. But the record does not establish that control of P&LE by any other system which could afford its purchase would bring about greater competition than its control by the applicants; and other interveners interested in preserving connections with P&LE have expressed doubt that independent operation of that carrier would be practical, explaining that its future, if divorced from the applicants, would be bleak.

The State of New York opposes any divestiture of P&LE from the applicants, as does the Chamber of Commerce of Greater Pittsburgh, with members in an area of approximately 3,000 square miles around Pittsburgh. The latter, satisfied with the reciprocal switching condition, notes the inconsistency between the Department's attitude on this matter and its insistence that E-L, D&H, and B&M be protected from the merger by including them in another system. The Chamber contends that P&LE, cut loose as an independent carrier, would face the same perils from which the Department would protect the three larger lines.

P&LE is presently operated as a division of NYC which owns 80 percent of its stock. Most of its officers are also officers of NYC and its car fleet is integrated with the car fleet of NYC. We believe a breakoff of this long, useful relationship would seriously weaken P&LE and create unnecessary difficulties for it in carrying out what we consider an important common carrier function in the Pittsburgh area. See *Control of Central Pacific by Southern Pacific, supra.* Accordingly, we find that divestiture by the applicants of P&LE's control as requested by the department would not be in the public interest. Divestiture, therefore, will not be required.

INCLUSION OF OTHER RAILROADS

NYS&W and NH inclusion and D&H trackage rights.— The recommended provisions for inclusion of NYS&W and NH's freight operations and grant of trackage rights by the Transportation Company to D&H between Wilkes-Barre, Pa., and Hagerstown, Md., are opposed on various grounds by CNJ, PNYA, Reading, and WM. CNJ chose not to participate in the hearings, thus leaving a void in the record as to its probable post-merger status. It asserts, however, that its financial situation has worsened; that, as a result, it took a more critical look at the transaction and concluded the merger would be a serious blow to its solvency while inclusion of NYS&W and NH's freight service and a grant of trackage rights to D&H would cause such a diversion of traffic as to force it into bankruptcy and possible liquidation.

D&H is not satisfied that the proposed trackage rights would provide it with sufficient protection from the effects of the merger. The Department and most of the New England governmental bodies contend that the passenger operation of NH should also be included in the Transportation Company.

As part of its system of railroad, NH operates the properties of The Boston and Providence Railroad Company, a corporation in receivership. Of 40,000 B&P shares issued, NH and a subsidiary hold 15,918; 3,272 are in a sinking fund for debentures owned by NH; 40 are in the B&P treasury; and 20,770 are publicly held. The B&P Minority Interests, representing holders of about 6,000 shares,[10] contend that the corporation is separate and distinct from NH and should be included in the Transportation Company in its own rights rather than as merely an operation of NH.

NYS&W.— This carrier provides a direct connection for the Transportation Company's traffic between the New Jersey area north of and including Linden on the one hand, and points north and west of Columbus, and Youngstown, Ohio, on the other. It also provides a direct route between, on the one hand, Little Ferry, N. J. (where it connects with NYC), and Marion Junction, N. J. (its point of connection with PRR), and, on the other, what will be the Transportation Company's principal New Jersey yards at Meadows and Greenville. Operation over the main line of NYS&W is vital in connecting applicants' lines to effectuate their merger and, at the oral argument, applicants stated a willingness to accept a condition requiring NYS&W's inclusion. All things considered, we find inclusion of NYS&W in the transaction to be consistent with the public interest, and we make it a condition to our approval of the merger application. Terms of the inclusion will be determined in a separate proceeding; but consummation of the merger need not await the conclusion thereof.

NH.—Without some radical change in circumstances, even if this merger application were denied, NH would face a nearly insuperable task in bringing itself out of bankruptcy. The Transportation Company, with new routings and improved service, could undoubtedly wean substantial traffic away from NH and leave that already moribund carrier in perhaps an irretrievable situation.

The hearing examiners recommend that the Transportation Company, as a definite condition to approval, be required to provide freight service over NH's line. As to passenger service, however, they propose only a contingent requirement—that (in

[10] The membership of stockholder groups changes from time to time, but according to representations made to the Commission in 1955, in Finance Docket 12131, Boston and Providence Corp. Reorganization, this particular group claims to hold something over 6,000 shares. In its report of March 31, 1962 (mimeograph), in that same proceeding, the group was found to represent about 3,000 shares.

recognition of the efforts of the various jurisdictions served by NH to preserve the carrier's passenger service) if the continuation of such service is found in the public interest and a reasonable return on capital committed to such service is provided for in the local-aid programs, the Transportation Company be required to perform NH's passenger operations.

The Manufacturers Association of Connecticut, which presented testimony of witnesses representing 30 large nationally known producers, urges that the merger be consummated without delay and without the burden of NH's passenger service upon the Transportation Company's freight operations.

The applicants are not averse to including NH's freight service in the merged system and have already reached an agreement with NH's trustees for doing so. They do not favor any requirement to include the passenger service, protesting that such would make necessary a renegotiation of the agreement, and a reappraisal of NH's properties to reflect passenger losses that are actually unpredictable. To arrive at equitable terms as to either NH's creditors or the burden that can properly be placed on the Transportation Company's system, would be extremely difficult, they contend. On the other hand, they say, a mutually satisfactory agreement is attainable with interested States for through service between Boston and Washington, D. C., and any other service for which the States are willing to pay.

The interveners question our jurisdiction to require inclusion of less than all of NH or to arrive at findings affecting its passenger service by other than a section 13a proceeding. These issues are rendered moot by the order herein requiring inclusion of an undivided NH, and by our decision being rendered today in the section 13a investigation into the NH trustees' proposal to discontinue all passenger service.

The oral argument in this case and our determination of section 13a investigation have afforded us a view of the NH inclusion issue herein, which was not available to the hearing examiners. Consequently, where they were required to proceed in a somewhat conjectural vein, we are now in a position to deal more definitively with NH inclusion.

In our section 13a investigation report, we commented upon the evidence, as well as the positions, of the States involved regarding the relationship between rail passenger service and the economy of the area affected; the question of alternative modes of trans-

portation in the absence of rail passenger service; the nature and extent of the New Haven's passenger deficit as it relates to continuation of New Haven's freight operations; the question of relative needs of the commerce of the area involved with respect to both freight and passenger service; and, perhaps most important, the extent of public support by States and local communities for the continuation of passenger service.

It is fundamental to the proper discharge of our responsibilities under section 5 to consider all facets of the New Haven's operations. The record in this proceeding would require consideration relative to the New Haven's passenger operations, to rest, in part, on assumptions. It would, we believe, be a disservice to our statutory responsibility, to the parties, and to the public at large to continue our consideration of this issue in the conjectural posture forced by circumstances upon the hearing examiners, when concurrently herewith we are determining the section 13a proceeding. Accordingly, we have deemed it reasonable and appropriate to consider and determine all facets of New Haven's passenger problems within the context of that section 13a proceeding, rather than by way of continuing jurisdiction under section 5 as proposed by the examiners.

Before turning to that proceeding, however, it should be made clear that, merely because it may be viewed as the embodiment of new efficiency and enterprise in railroad transportation, the Transportation Company is not to become the repository for all the ailing railroads in the East nor the sop for their financial and operating problems. The objectives of this merger which we associate with the public interest will not be jeopardized by aimless dissipation, for to do so could cancel out the benefits we visualize and render the transaction inconsistent with the public interest. The inclusions contemplated by section 5(2)(c) and (d) require a careful weighing of all relevant factors to insure that, if inclusion is to be a condition of approval, it will be feasible, equitable, just and reasonable.

In this context, and in the light of and subject to the order in the section 13a proceeding which is being served simultaneously with this report, we find that this merger, without complete inclusion of NH, would not be consistent with the public interest, and, accordingly, we will require all the New Haven railroad to be included in the applicants' transaction.

In so doing, we reflect our commitment to the conclusion that the public interest requires a complete restructuring of

all New Haven operations. Inclusion of the New Haven's services and the restructuring effort which we call for here and in our ultimate conclusions in the discontinuance case will not be easy. It will demand coordination, cooperation and statesmanship on the part of many interests involved as well as the railroads. And we do not in any sense overlook the fact that, since New Haven is in bankruptcy, its inclusion will entail reorganization problems under section 77 of the Bankruptcy Act which must be resolved in conjunction with any inclusion proceeding herein.

What we have treated in the discontinuance proceeding as only a beginning toward sound restructuring of NH, in effect, allows the discontinuance of approximately 50 percent of the New Haven long haul or through passenger schedules. It is by no means an ultimate determination of the New Haven's passenger problems; in the discontinuance report we call for a continuation of public and private effort toward the goal of an ultimate determination which will give the area concerned privately-owned passenger service to be operated without an undue burden on the new Transportation Company and for the economy of the area affected. We have called for both public support and increased effort on the part of railroad management.

The States most interested in NH passenger service are engaged in negotiations with both the management of PRR and NYC and the NH trustees for continued operation of NH passenger service. Apparently, final agreement has not yet been reached. Meanwhile, certain assistance has been extended NH by those States. The position of Connecticut was stated as follows:

> If essential passenger service is operated by the merged company at an unreasonable loss, Connecticut is willing to bear a fair share of its burden; if there is a burden, we will pay a fair share.

In consideration of continued operation of through passenger service, Rhode Island is committed by contract to provide certain financial support to NH through June 30, 1966, and has an option to renew the contract for another 6 months. Rhode Island's position with regard to rail passenger service was given thus:

> ***we in Rhode Island must realistically admit that the present passenger levels and revenues do not economically justify the present level of service and that some curtailment of service and/or financial support or further tax

relief are inevitable at least until the planned northeast corridor has proven itself financially successful.

* * * * * * *

Rhode Island is willing to do its share to see that the passenger service does not constitute an undue burden on interstate commerce.

In the same vein, Massachusetts expressed confidence that questions as to amount of service, operating costs, level of State government support, et cetera can be resolved on a basis fair to the States, yet not constituting an unreasonable burden on NH or the acquiring carriers.

Connecticut, Rhode Island, and Massachusetts are providing cash assistance to NH through June 30, 1966, with contract options to extend the schedules an additional 6 months on the Shore and Connecticut Valley Lines. Applicants and the States have progressed toward an agreement, but apparently all questions have not been resolved among them. At oral argument Massachusetts and Rhode Island requested an additional 30 days to complete the negotiations. More than that time has gone by, but thus far we have received no notice of successful negotiations.

In the discontinuance proceeding we have provided for interim measures to have essential rail passenger service continued through the end of this year. This will give the States and the applicants further opportunity to reach agreement on such things as the level of service, costs, and public support; and to arrange for a restructured passenger service and an equitable distribution of the burdens thereof as anticipated by the several States in their position statements made to us at the oral argument herein.

Thus, the inclusion of New Haven's passenger service shall in no way be applied or construed to mean that New Haven passenger deficit operations, if undue, must be borne by the savings resulting from this merger.[11] This is not to be construed, however, as diminishing our admonitions and views in the discontinuance proceeding that the continued initiative of private enterprise clearly will be needed to effectuate a just and reasonable ultimate solution.

Accordingly, we find that inclusion of New Haven's freight and passenger operations in this transaction will be consistent with

[11] We do not here refer to any necessary adjustments that may occur with respect to the hearing examiners' suggestions of $5.2 million in savings from combing the New Haven system with the new Transportation Company.

the public interest, and our approval of the merger is conditioned upon such inclusion.

We will also reserve jurisdiction to determine the terms and conditions of such inclusion. Within six months after the date this report is served, the parties shall file, for our approval, a plan covering the terms and conditions agreed upon for such inclusion. In the event the parties concerned do not reach an agreement and file such a plan within said period, we shall, upon due notice to all parties in the instant proceeding, undertake whatever procedure we then deem appropriate to establish the terms and conditions for inclusion of the New Haven. Consummation of the merger by applicants shall indicate their full and complete assent to these requirements. With regard to the trustees of the New Haven Railroad, their assent, we recognize, is also subject to appropriate procedures of approval in the United States District Court under the Bankruptcy Act.

Regarding inclusion of the Boston and Providence Railroad Company (whose properties are being operated by NH as agent), we see no reason for burdening the Transportation Company with the debt of the B&P. The record does not support the B&P minority interests in this respect. Accordingly, the Boston and Providence Railroad Company is to be included only to the extent its properties are presently operated by NH. This means that the relationship between B&P and the Transportation Company shall be essentially like that now existing between B&P and NH. Transportation Company shall merely take the place of the NH as the agent operating B&P properties. The status of those properties and of the B&P debts shall be as set forth in the Commission's report of March 11, 1966, in Finance Docket No. 12131, *Boston and Providence Railroad Corporation Reorganization*. NH's motor carrier affiliates are also to be included, but the terms of their acquisition by the Transportation Company, including the nature and extent of their operating rights to be acquired, will be arrived at in the inclusion proceeding.

Both Reading and WM indicated at oral argument that their objections to the NH inclusion would be satisfied by a condition protecting them against diversion of traffic from their routes with NH to routes via Transportation Company and NH. Reading, WM and CNJ will have an opportunity to appear in the inclusion proceeding to seek protection for their traffic and gateways.

D&H trackage rights.—Reading, PNYA, CNJ, and WM object to the condition that PRR provide trackage rights to D&H between

Wilkes Barre and Hagerstown. They insist that further hearings are required to determine first whether the rights are needed, and, if they are, whether additional conditions should be imposed to protect routes or carriers affected by exercise of the rights.

The condition, as stated in appendix U of the initial report specifically notes that applications under sections 5 and 1(18) would have to be filed and that Commission approval thereof is a prerequisite to a granting of the trackage rights. To the extent interveners consider that a grant would be forthcoming without a hearing, their opposition is premature. This record does not provide the evidentiary basis for all the findings required to be made under section 5(2) for a trackage rights authorization.

Moreover, in conjunction with its petition for inclusion in N&W, D&H has reached agreement with PRR on terms under which the trackage rights would be granted. The terms provide that the rights would become effective on the last-occurring of three dates: The consummation date of the PRR-NYC merger, the date D&H is "actually included" in the N&W system, and the effective date of an order from this Commission approving the trackage transaction. Of this agreement we take official notice.

Thus, as to these trackage rights, D&H and PRR have made mutual commitments to be executed in futuro and in relation to the outcome of D&H's petition for inclusion in N&W. Since, to carry out their agreed obligations, an application must be filed under section 5(2), it would serve little purpose for us to make findings at this time on the basis of only a partially adequate record—when, in due course, a complete record dealing with the trackage transaction can be compiled. Consequently, we shall take no dispositive action as to the trackage rights at this time.

Inclusions of E-L, D&H and B&M.—Inclusion in Transportation Company is sought by these three carriers as an alternative to their first preference which is inclusion in the N&W system. The hearing examiners recommend we deny the petitions herein without prejudice to renewal within 10 years should it become apparent within that time that affiliation with N&W cannot be accomplished; and that we provide now for a record then to be made to determine whether, and under what conditions, inclusion herein would be consistent with the public interest.

D&H, E-L, PNYA and N. J. PUC except to the examiners' failure to postpone consummation of the merger until the three petitioners are assured of inclusion in N&W. PNYA, B&M and

NE Council advocate consolidation of this proceeding with the reopened *N&W* merger case, *supra*. The Department suggests an 18-month delay to give these petitioners "time to apply" for inclusion in N&W. As heretofore noted, they have already applied, and public hearings on the matter have been scheduled. Mass. DPU is particularly concerned that B&M be assured inclusion. CNJ calls the 10-year period a futile gesture which can be whiled away without results.

The three petitioners contend that, in the face of the emerging eastern rail combinations, they, with their limited resources, would be unable to sustain themselves as independent carriers, and that, consequently, the public interest lies with their inclusion in either N&W or Transportation Company, more so in the former. In this they have the support of a number of the interveners. They also assert that traffic now moving over their routes in combination with the routes of PRR or NYC would be diverted to the new through-routes of Transportation Company, that as a result they would become less attractive candidates for inclusion in the N&W system, and that their power to bargain with N&W for inclusion would be nullified through no fault of their own.

The service the three petitioners render their shippers is essential and the public interest dictates that it be preserved. Unless somehow protected, through inclusion herein or by some other equitable means, the petitioners would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve. Though this be true, we shall not require their inclusion in the PRR-NYC merger at this time. They have an established right to obtain first a determination on their petitions for inclusion in the N&W system.

In the *N&W* merger case, *supra*, a compact was made under which the applicants therein by consummation of their transaction, irrevocably agreed to include these three petitioners in their system upon terms agreed upon among themselves or, if necessary, prescribed by us, provided such inclusion is found to be consistent with the public interest. As part of the compact, this Commission agreed to entertain the petitions, if and when filed during the 5-year period set; to compile an appropriate record; and to hinge a decision thereon.

At the time it had the N&W merger under consideration, the Commission was informed that E-L and N&W were negotiating toward an affiliation between them. For example these statements appear in the *N&W* merger case, *supra*, 324 I.C.C. 1, at page 22:

Throughout almost the entire course of these proceedings, the Erie-Lackawanna and the applicants have joined in entreating us not to require Erie-Lackawanna inclusion but to approve the transaction as proposed, leaving to themselves the latitude to resolve the problems between them in due course of time. They have both bent their efforts toward developing a record to support a finding that the proposed transactions would be consistent with the public interest without Erie-Lackawanna inclusion at this time, considering that negotiations for Erie-Lackawanna inclusion later have been provided for.

and at page 28:

To allow full exploitation of the plans thus far voluntarily developed by the Erie-Lackawanna and Norfolk & Western, and to afford the fullest protection to the public interest * * * we shall * * * hold the way open for the Erie-Lackawanna, within 5 years after the date of the order herein, to file a petition for affiliation with the Norfolk & Western system.

Similar provision was made for D&H and B&M to file petitions for affiliation with N&W. The specific terms of the compact referred to above and the procedure contemplated for handling these inclusion petitions are set forth in appendix O of that same report. Item 3 of those terms provides that:

Consummation by the applicants of any transaction herein shall constitute on the part of such applicants acquiescence in and irrevocable assent to the conditions stated in this appendix.

The transaction was consummated without dissent from the applicants.

Relying upon that compact, the three petitioners refrained from contesting our decision in the *N&W* merger case, as did the several other parties whose interests lie with the petitioners' well-being, and now they rely again on it to obtain a determination as to their preferred affiliation with N&W on the basis contemplated in the *N&W* merger report.

We, therefore, shall not make it a prerequisite to approval of the PRR-NYC merger, that applicants negotiate now for the inclusion of the three petitioners. Instead, we shall withhold action on the petitions of these three carriers for inclusion herein, until final disposition is made of their petitions for inclusion filed in the *N&W* merger case. In the event the petitions are granted in that case we shall take no further action on those submitted in the instant proceedings. They will be considered dismissed as

moot without further order herein, concurrently with any grant in whole or in part of the petitions in *N&W* merger case becoming effective.

If the petitions in the *N&W* merger case are denied, the applicants and petitioners, within one year following the final order or judgment in such denial, are to submit for our consideration, by supplemental petition in this proceeding, terms and conditions of any transaction enumerated in section 5(2)(a) of the act by which inclusion of the petitioners in the PRR-NYC system is proposed to be accomplished. In the event no inclusion agreement is reached by the parties within the prescribed time, we shall, upon due notice to all parties to the instant proceeding, undertake by whatever procedure we then deem adequate to determine whether inclusion of any one or all of E-L, B&M and D&H in the Transportation Company's system would be consistent with the public interest; and, if so found, equitable terms for such inclusion. As to traffic, routes, and gateways, the parties, in arriving at a voluntary agreement, are to negotiate with carriers not being included, as prescribed above in the case of the NYS&W and NH inclusions.

We have consistently refused to consolidate the various eastern consolidation proceedings for decision, although urged to do so by substantially the same parties in each proceeding. See *Chesapeake & O. Ry. Co.–Control–Baltimore & O. Ry. Co.*, 317 I.C.C. 261, 266, and *N&W* merger case, page 19. As in the two cited proceedings, the applicants, after exhaustive public hearings at which all interested parties were permitted to appear and present their cases, have established a record completely adequate for us to make a finding with respect to the public interest as to their proposal, and to provide appropriate conditions regarding inclusion of E-L, B&M and D&H. Accordingly, we find that, with the reservations hereinafter discussed to protect E-L, D&H and B&M, it would not be in the public interest to deprive the applicants of the immediate benefits of the merger or their shippers, of the improved service the merger will provide. Therefore, we shall not consolidate this proceeding with that of *N&W* merger for decision of the petitions for inclusion, nor shall we require a delay in the consummation of the merger until such time as the petitions are decided.

We realize, however, that when the various consolidations of yards and equipment and the new through routes contemplated by the applicants are effectuated, a substantial amount of traffic could be diverted from E-L, D&H, and B&M. To minimize such

a possibility, we shall impose conditions designed to temporarily maintain, as nearly as possible, the status quo as to traffic for which these three petitioners compete with the applicants and other carriers comprising the merged system.

On this record, therefore, we conclude that immediate consummation of the proposed merger would be consistent with the public interest, if conditions are imposed to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections.

It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger.

The assurance of protection must come from applicants through their acceptance of and active cooperation in the implementation of conditions imposed by us for operation during the pendency of proceedings dealing with inclusion of the 3 protected carriers into a major system.

We recognize that one result of such conditions would be to deny to applicants and some shippers, for the time being, some of the merger benefits, but they will in no case detract from the present amount and quality of service being provided by applicants, nor should they work an undue hardship upon applicants either in their operations or merger implementation. In short, they are designed to prevent any loss of revenue over the three railroads as a direct result of immediate consummation of this merger.

Our approval of the merger for undelayed consummation shall be subject, therefore, to the conditions specifically described in appendix G. These conditions provide for (1) the temporary preservation of present practices and patterns (as to both routes of movement and volume) on traffic for which E-L, D&H and B&M compete with applicants and other railroads making up the proposed system; (2) the payment of an indemnity by the Transportation Company to E-L, D&H and/or B&M whenever, in a given year, the revenues of E-L, D&H and B&M are, as to each of them, proportionally less than the combined revenues of each protected carrier and the Transportation Company, as computed on the basis of the relationship existing between such revenues for the year 1964; and (3) procedures for the determination of questions

arising under appendix G (including questions as to liability for payment of the indemnity and the amounts thereof), for the investigation of complaints and the issuance of orders relating to rights, duties, liabilities and procedures arising under appendix G; and (4) the voluntary agreement by Transportation Company and E-L, D&H and/or B&M for protection of the latter three carriers on a basis other than that provided here, but mutually acceptable to them.

In arriving at the amount of indemnification, if any, due in a particular calendar year, the following procedure will be used:

1. A base revenue ratio will be ascertained by dividing the protected carrier's freight revenues for the year 1964, by the sum of the revenues of that carrier, PRR and NYC for 1964. Freight revenues are those shown in Account 101 of our Uniform System of Accounts. The ratio so ascertained states the percentage relationship which the protected carrier's freight revenue bears to the sum of the freight revenue of applicants and said carrier. Based on the year 1964, for E-L the base revenue ratio is 13.0967 percent; for D&H, 3.2819 percent; and for B&M, 4.2578 percent.

2. The freight revenues of the Transportation Company and the protected carrier are totalled for the year in question, and their sum is multiplied by the base revenue ratio to arrive at a hypothetical figure which we shall call the "standard revenue."

3. If, for the year in question, the freight revenue of the protected carrier (which we shall call "earned revenue") is less than the "standard revenue", the difference ascertained by subtracting the "earned revenue" from the "standard revenue" is the indemnification base.

4. The protected carrier's average freight operating ratio for the years 1962-65 inclusive, will be subtracted from 100 percent to produce what we shall call the "indemnification factor." For E-L the indemnification factor is 79.24; for D&H, 74.73; and for B&M, 73.36.

5. To arrive at the dollar amount of the indemnity, the indemnification base is multiplied by the indemnification factor.

6. In any year when the "earned revenue" of a protected carrier is *not* less than the "standard revenue," no indemnity will be paid to that carrier.

The formula may be stated thus:

Amount of Indemnification = Indemnification Base multipled by the Indemnification Factor

Or stated differently—

Amount of Indemnification = [(Sum of Freight Revenues multiplied by Base Revenue Ratio) minus Earned Revenue] multiplied by (100 minus Average Freight Operating Ratio, 1962-65)

The year 1964 is selected as the base year, because it reflects the relationships we seek to preserve as they were in the most recent year for which we have finalized data prior to the merger authorization.

To avoid questions regarding the use of this unique, but simple, indemnification provision, the following example is provided as a guide to its application:

1964 Freight revenues, E-L		$ 176,512,915
1964 Freight revenues, PRR-NYC	+	1,171,256,031
Total freight revenues 1964		$1,347,767,946
Base revenue ratio, E-L, 1964		13.0967 percent
y year freight revenues, E-L		$ 200,000,000
y year freight revenues, Transp. Co.	+	1,330,000,000
Total freight revenues, y year		$1,530,000,000
Standard revenue = $1.53 billion × .130967 =		$ 200,379,510
Less earned revenue	-	200,000,000
Indemnification base		$ 379,510
Indemnification factor (100 - 79.24[a])	×	.2076
Amount of indenmification to E-L, y year		$ 78,786.28

[a]E-L's average freight operating ratio, 1962-65, expressed as a percentage of 100.

In imposing the conditions we anticipate that the petitioners will not relax their own solicitation efforts nor permit the quality of their service to decline upon the expectation that their traffic or revenues are guaranteed by the Transportation Company. Any evidence of such practices brought to our attention may be considered a prima facie reason for reopening these proceedings to consider revision or deletion of the conditions.

BEDT.—This carrier performs a car-float service between its 3 stations on the east bank of the East River and all the trunk-line railroads serving the Port of New York. It has petitioned for inclusion in this transaction, contending that, without such

inclusion, it would lose so much traffic to the Transportation Company that it would have to abandon its operation as a railroad terminal. As put by the petitioner, its shippers will prefer the expedited service via the Transportation Company and the LIRR over new routes not requiring the use of car-floats. It contends that as much as 49 percent of its traffic is vulnerable and, as a result, it could not stand up to the new competition long enough to survive the processing of a second inclusion petition for which provision was made in the initial report.

The degree of vulnerability is overstated. The estimate of divertable team-track and outside-float traffic is based on the unwarranted assumption that all such traffic which does not move via gateways in Virginia will henceforth move via Buffalo and Selkirk Yard or NH. In addition, it appears that the estimate contains a substantial redundancy in the computation of team-track revenues.

Most significant, however, is the fact that since LIRR has been purchased by the State of New York and will be operated by the Metropolitan Commuter Transportation Authority primarily as a passenger line, BEDT will not be confronted by a new, time-saving, single-line freight service. Transportation Company's operation will terminate at Fresh Pond Junction, where an interchange will be necessary. Thus, notwithstanding the merger, the competitive situation as to BEDT will remain substantially as it is. Considering this along with the unique services BEDT performs for its shippers, and the general approbation expressed by those shippers who testified herein, we conclude that this merger is not likely to cause serious diversion from BEDT.

Inclusion of NH—and, consequently, of Connecting Railway—could make an overland route feasible in connection with NYC's East Shore Line over which traffic via Buffalo could gain time by avoiding the car-float at the Port of New York. Whether and how BEDT might be affected, and whether BEDT's terminals could be made a useful part of such a route, are questions for which this record does not hold the answers. With regard thereto, all concerned will have a full opportunity to be heard if an when an NH inclusion proceeding gets under way.

As to BEDT's petition for inclusion at this time, in our opinion the disposition recommended in the initial report is wholly adequate in view of the circumstances relating to LIRR's relationship to PRR, and is adopted as our own. The petition of BEDT is denied without prejudice to submission of a further application or

supplemental petition in this proceeding for inclusion of BEDT no later than five years after the consummation date of this merger, showing the impact of the merger upon BEDT's finances and traffic. In the event an application or petition is filed, the applicants are to join therein and cooperate fully to develop a record on which the required statutory findings with respect to the public interest can be based.

Maryland and Pennsylvania Railroad Company.—On October 15, 1965, the M&P filed a petition for leave to intervene in these proceedings and for inclusion in the Transportation Company system. Incorporated in 1901 in Maryland and Pennsylvania, and originally providing freight and passenger service between Baltimore, Md., and York, Pa., this petitioner now operates about 45 miles of track between York and Whiteford, Md., in freight service only. Its only physical connection for the interchange of traffic is with PRR at York.

M&P properties, valued at approximately $850,000, are encumbered by first mortgage bonds maturing March 1, 1981, of which $87,000 are now outstanding in the hands of the public and $29,000 have been pledged as security for the first consolidated mortgage bonds maturing October 1, 1993, of which $132,000 are now outstanding.

In 1960, an application by M&P to abandon its entire line was denied in Finance Docket No. 20808. Relying on that denial as proof that its service is necessary, petitioner argues that neither it nor any other railroad will have much chance of survival if not included in one of the large systems now emerging. It purports to be wholly dependent upon the service of connecting carriers—and in this regard, especially vulnerable—averring that any diminution on that service would almost instantly result in an operating deficit for itself. The relief it seeks is that, as a condition to approval of this merger, we provide for a 5-year period during which it might present any facts and circumstances showing that it should be included in the Transportation Company.

Applicants object to the petition on the ground that it is not timely. Sufficient grounds for intervention have been shown under Rule 1.72 of our General Rules of Practice, and no broadening of the issues is involved.

We find nothing in the petition to indicate that M&P's traffic or revenues will be adversely affected by the merger. It does not appear that the connections will be disturbed or that service to the

industries M&P serves will be lessened as a result of the merger. Under such circumstances we cannot make the finding required by section 5(2)(d) that inclusion of this petitioner, as a prerequisite to approval of the instant merger, would be in the public interest. The petition is accepted for filing and granted to the extent leave to intervene is sought. It is denied to the extent petitioner requests inclusion in the transaction.

OTHER CONDITIONS REQUESTED BY INTERVENERS

Baltimore interests.– This intervener is not opposed to the proposed merger if the agreement between PRR, P&LE and WM set out in appendix M of the initial report is imposed and, in the event C&O obtains control of WM,[12] continued in force. It does object, however, to the suggestion that modification of the condition might be warranted if the C&O control application is granted. The agreement is aimed at continuing the P&LE–WM route as a fast, competitive route, with no diminution in its standards of service but rather a constant cooperative endeavor to improve them. The examiners adopted it as a condition of the merger's approval; and provided for such modification as may be required by the public interest, upon application of any person having an interest therein or upon the Commission's motion. The provision for modification is merely an acknowledgement that, since the approval conditions are to some extent legislative, the exercise of this quasi-legislative function by the Commission is attended by the inherent latitude to make such amendment as may be required by the public interest when a substantial change in circumstances occurs. Moreover, the statute, in sec. 5(9) clearly contemplates that changing circumstances may from time to time make modification of conditions appropriate; and it provides the Commission with jurisdiction to do so, which jurisdiction we are in no position to waive. We therefore adopt the terms stated in appendix M of the initial report, restated in appendix H of this report, and make our approval of this merger subject thereto.

Monon and C&EI.– Initially these two interveners posed only limited objections to the merger, some of which are similar in

[12] An application for authority to acquire control of WM was filed jointly in Finance Docket No. 23178 by C&O and B&O on June 24, 1964. A report and recommended order of the hearing examiner approving the application was served August 3, 1965. Thereafter we heard oral argument and now have the matter under active consideration.

that relief is sought from obligations arising out of long-standing contracts with one or both of the applicants. In addition, Monon sought conditions requiring the re-establishment of interchange points it had with the applicants prior to July 13, 1960; and C&EI seeks conditions to lessen the merger's impact upon its traffic.

Monon's contract with the Indianapolis Union Railway Company (IU.)—owned jointly by PRR and NYC—was executed in 1883. Among other things, it fixes the basis for rentals on the passenger depot at Indianapolis and specifically provides that no railroad's share of the fixed rental shall be abated because of non-use. Monon discontinued passenger service at that depot in 1959. Its continuing obligation under the contract obviously is in no way related to this merger; and, consequently, though there may be other avenues available, this is not the appropriate proceeding for obtaining the relief sought.

Switching at Indianapolis is performed by IU, with charges assessed on the basis of the 1883 contract. As of July 13, 1960, NYC caused a change to be made in switching stations for interchange of traffic with Monon. A year later PRR made similar changes. Both changes increased Monon's switching costs. The situation was not caused by the proposed merger and will be little affected by it. We cannot, therefore, order in this proceeding a restoration of the prior switching arrangement.

The Commission's power under section 5 is limited to the application before it and the consequences thereof. Orders issued pursuant thereto are permissive, and obligations imposed upon applicants as conditions of approval are inchoate, attaching with binding force only if the proposed transaction is consummated. If the transaction is not consummated, though approved, the conditional obligations under our order evaporate.

By petition filed February 14, 1966, Monon seeks further hearing and either inclusion in the merger or further conditions. The need for this late-requested relief is said to arise from developments following the close of the hearings, which allegedly make the Monon more vulnerable to the merger's effects. Among such developments with respect to which Monon proffers evidence are:

(a) Denial of Monon's applications in *Monon R. Construction and Operation*, 324 I.C.C. 208, for direct access to a Lake Michigan port needed for the establishment of Monon service between that lake and the Ohio River.

(b) Approval in Finance Docket No. 21755 of control of C&EI by the Missouri Pacific Railroad Company with a condition respecting the acquisition by Louisville & Nashville Railroad Company of C&EI's line between Evansville, Ind., and Chicago, Ill. (It is contended that L&N's acquisition of the Evansville line would reduce Monon's revenues by $2 million annually through the loss of certain traffic now interchanged with L&N.)

(c) The substantial loss of traffic experienced by Monon as a result of the *N&W* merger case.

(d) The withdrawal of Monon's application in Finance Docket No. 23645, for authority to gain control of the Chicago South Shore and South Bend Railroad, in the face of C&O's application for the same authority in Finance Docket No. 23566. (C&O agreed to provide Monon with trackage rights over South Shore's line between Michigan City, Ind., and the Illinois–Indiana State line in order to serve facilities at Burns Harbor on Lake Michigan, and in Finance Docket No. 23918 Monon seeks authority to acquire the trackage rights. The application has been heard, but briefs are still to be filed.)

Monon contends that, the foregoing developments have substantially impaired its prospects of continuing as a viable enterprise; many shippers and communities have no other railroad service available; its efforts to gain direct access to Lake Michigan have been unsuccessful and, in view of NYC's opposition, the results of its trackage rights application in Finance Docket No. 23918 are uncertain and at best subject to substantial delay; the PRR-NYC merger is a further threat to its ability to render adequate service to the public; and that it cannot afford to rely on Transportation Company for voluntary cooperation or an attitude of altruism.

Monon asserts that adverse effects upon its operations would be alleviated and that it would be able to continue operations as an independent entity, if approval of the merger were made subject to the conditions seeking contractual relief and the reestablishment of interchange points discussed and disposed of previously herein. Additionally, conditions are requested requiring the Transportation Company to: grant Monon trackage rights over NYC's existing line between Burns Harbor and Otis, Ind., including rights to serve industries at the harbor; maintain existing interchange points and establish new ones with Monon; establish and maintain joint rates with Monon; cause Indianapolis Union Railway Company

to grant Monon joint use rights over its facilities, including the Indianapolis Belt Railroad, and the right to interchange freight with the Transportation Company and other railroads connected to and served by Indianapolis Union facilities. Finally, Monon requests such other conditions as may be justified to alleviate adverse effects of the merger and permit it to maintain effective competition with the Transportation Company.

The adverse developments recited by Monon are in no way related, either directly or indirectly, to the instant merger. The question of whether the public interest requires Monon's access to Burns Harbor and Lake Michigan is the subject of two other proceedings, one decided and one pending. It is foreign to the issues here at hand. In Finance Docket No. 21755, L&N is accorded the right merely to negotiate for the acquisition of C&EI's Evansville-Chicago line. The acquisition itself would require our prior approval in a separate section 5(2) proceeding, and any adverse effect thereof upon other carriers would be material to that proceeding, not here.

As to the competitive effects of the *N&W* merger case, we believe it would be neither reasonable nor fair to impose conditions herein designed to permit Monon to recoup from the applicants, losses incurred through its failure to compete successfully with N&W.

Monon has been a party to these proceedings from their inception. It participated in the hearings, submitted evidence, filed a brief, filed exceptions to the initial report and participated in oral argument. It has had ample opportunity during its lengthy participation to show how it would be affected by the merger. We see no valid reason for delaying our decision in order to receive further evidence in this respect, particularly when such evidence would concern alleged adverse effects flowing from matters unrelated to the merger.

While this merger, modified by the conditions imposed herein, would be a forward step in rationalizing the eastern railroad system, it does not provide the solution to all the rail problems in the district—as noted elsewhere in this report, it is not the panacea even for applicants' problems. We do not conceive it, therefore, as a haven for railroads whose difficulties stem from causes not associated with this transaction. That the Monon may be in a perplexing situation does not, of itself, justify either inclusion or the other relief sought herein.

C&EI seeks to prevent an increase in its charges for trackage rights over NYC's line between Pana and Granite City, Ill. Under the merger proposal NYC will reduce its use of that segment, and, as a result, C&EI's proportional share of the line's costs will be increased. In the event C&EI becomes affiliated with the Missouri Pacific Railroad Company, as authorized in Finance Docket No. 21755, decided in 1965, and now pending judicial review, its use of the line may substantially increase. The changing circumstances brought about by the proposed merger warrants a reappraisal of the trackage charge obligations. The examiners provided that C&EI's charges shall be maintained no higher than the present dollar amounts for a period of one year following rerouting changes to be made by NYC. During that time the parties are to negotiate a fair and equitable arrangement, and failing therein, they are to present the matter to the Commission for a prescription of terms. Notwithstanding C&EI's request that the present dollar ceiling be made permanent for the remaining 966 years of the trackage agreement, we find the examiners' proposal to be fair and appropriate, and adopt it as our own.

Conditions are also sought by C&EI to require such scheduling of applicants' freight trains as to maintain present connections with C&EI; to require applicants to create and maintain new routes with applicable competitive joint rates, and just and reasonable divisions, in conjunction with connecting carriers at available junctions and gateways; and to require reciprocal switching at all new industries located on the lines of the Transportation Company.

The freezing of freight train schedules would unduly handicap the Transportation Company in efforts to cope with competitors generally and to meet the changing requirements of commerce and industry. Such stability as is required to protect existing connections is adequately provided for in the standard routing conditions set out in appendix L of the initial report and appendix I herein, which conditions we adopt unchanged.

Regarding the other protections sought, C&EI is unduly apprehensive of the applicants' ability to divert its traffic, and does not give adequate weight to its own ability to provide superior service in the pertinent areas of competition. The changes proposed by applicants do not amount so much to improved service in those areas, as to the effectuation of economies in their own operations. Moreover, C&EI undoubtedly will have the benefit of intensified competitive efforts by the carriers with which it

connects on routes competitive with those of the Transportation Company. And in the event its affiliation with Missouri Pacific is realized, C&EI will be further strengthened—as to finances, equipment, traffic, solicitation force and other important factors—further fortifying it against the competitive effects of applicants' merger.

We confirm the findings and conclusions regarding the conditions requested by Monon and C&EI, as contained in the initial report, and adopt them as our own. Monon's petition for reopening and for the imposition of conditions is denied.

Levine Group.—This intervener represents a group holding a portion of the outstanding shares of The Peoria and Eastern Railway Company (P&E) not held by NYC, the majority stockholder. When these proceedings began, NYC held about 51.96 percent of P&E stock, and operated the company under an agreement approved in *Cleveland, C., C. & St. Louis Ry. Co.—Operating Agreement*, 320 I.C.C. 430. The intervener presented no evidence at the hearing, filed no brief, and did not present oral argument.

On exceptions, the intervener recites the history of a five year dispute with NYC over P&E traffic and revenues. It expresses fears that traffic now moving via P&E will, after the merger, be moved over PRR's line. For the protection of its individual members, it asks that applicants be required to purchase the P&E shares now in the hands of the public, or to guarantee the income of P&E and/or prohibit the rerouting of traffic that would normally move over P&E, and take such other measures as may be required to protect the P&E minority.

In connection with this intervener's contentions we note that in *Cleveland, C., C. & St. Louis Ry. Co.—Operating Agreement*, *supra*, division 3 in response to this same intervener's contentions found at page 434 that in some instances "as a result of the relationship between the Central [NYC] and Peoria [P&E], the latter company receives preferred treatment", and in other instances "there is no indication that the Peoria is being treated unfairly". And at page 436 the division found that "the available evidence demonstrates that notwithstanding the claimed adverse effect to the Peoria as a result of the existing divisions, it has prospered financially during recent years." Nothing in this record indicates a change in policy toward P&E by the Transportation Company.

Having considered the representations made on behalf of the minority stockholders, we find nothing in the record to support the conditions they request.

EMPLOYEE CONDITIONS

The applicants and 23 unions representing about 75 percent of the applicants' employees, on May 20, 1964, entered into an agreement for the protection of those employees represented by the signatory unions who might be adversely affected by the merger. The agreement provides that the Transportation Company will accord its employees most of the benefits of the Washington Job Protection Agreement of 1936, and, in addition will retain all employees of PRR and NYC who are willing to accept employment, and that none shall be deprived of employment or be placed in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment. The Company is free to transfer work throughout its system and employees will have the opportunity to move to places where new jobs are created; but transfer of employees across seniority lines will be within their craft on the basis of implementing agreements to be negotiated from time to time as provided for in the basic agreement. Disputes are to be arbitrated—under a plan which we consider superior to that contained in the Washington Agreement. Applicants are willing to make the terms of the agreement available to all the employees whom we are required by law to consider in evaluating the proposed merger, including those not represented by the signatory unions.

Though they have in the past reduced the number of their employees by more than 50 percent over a ten-year period, the applicants, under this agreement will not be free to reduce their work force unless business contracts by more than 5 percent in any 30-day period, in which event the work force may be reduced one percent for each one percent business decline in excess of the said 5 percent. If the plan of the merger successfully materializes, however, and company growth results, new and additional jobs will be created. This, along with normal attrition and the voluntary separation from employment of those who would rather not move to a new location, should enable the Transportation Company to maximize the proficient utilization of the retained work force.

The cost of protection provided by the agreement is estimated as $78 1/4 million, of which practically all would be payable over the first 8 years. That is almost $5 million less than the estimated cost of providing benefits under the *New Orleans* conditions. While these estimates are necessarily imprecise, and perhaps could be improved by more exacting studies over longer periods of time, we find them to be reasonably adequate. Since technological advances and other variable factors affecting employment make their influences felt to a large extent in unpredictable ways, the data presented by the applicants may well be as reliable as could be expected. On this record, therefore, we find nothing of substance to support the contentions that the cost of the employee benefits under the agreement is understated and that the conditions will impose a burden on other railroads.

The last sentence of section 5(2)(f) of the act provides that, notwithstanding any other provisions of the act, employee protection may be established by agreement between a railroad and the unions representing its employees. Consequently, except to find, as we do, that the agreement of May 20, 1964 does not render the proposed transaction inconsistent with the public interest, we can make no requirement as to the protection of employees covered by the agreement.

As to the affected employees not represented by the signatory unions, section 5(2)(f) requires that a fair and equitable arrangement be provided to protect their interests so that the transaction will not result in their being in a worse position with respect to their employment. The agreement discussed above, if made applicable to these employees as well as the 75 percent of the work force represented by the 23 unions, would provide the required gaarantees. Under it, employees would be retained in their present or comparable employment, with no worsening of position. If the employment makes a change of location necessary, the move would be at the carrier's expense, and, in this respect, the provisions of the agreement are not unlike those prescribed by the Commission in other consolidation cases. Should an employee choose not to move, he would be entitled to a severance allowance like that of the Washington Agreement, a contract executed by practically all of the Nation's railroads and rail employee unions, and one which has been retained by them down through the years. Moreover, it would appear that, as the product of the negotiation efforts of the leaders of the signatory unions, the agreement of

May 20, 1964, embodies the kind of benefits which rail labor in general seeks; and as to its attrition provisions, is probably more beneficial to employees than are collective bargaining agreements in most, if not all, other industries. We find it fair and equitable, and as a condition to our approval of the merger, require that it be applied to the affected employees not represented by the signatory unions.

It must be recognized that applicants have agreed to certain benefits greater than we have heretofore required of any section 5 applicant, e.g., the job-retention (attrition) and the limitations against reduction in force, which embrace protection from adverse effects not causally connected with the merger. At the present stage in the evolution of employee-management relations, there may be some question as to our power to impose conditions dealing with matters having no causal relation to the section 5(2) transaction before us. By the same token, the signatory unions have conceded certain rights gained through previous collective bargaining. The exchange of *quid pro quo* appears entirely reasonable. The agreement constitutes a package plan giving employees more than they have previously been able to attain, and which is not severable as to its parts. Accordingly, and in view of the applicants' willingness to extend the benefits to all employees, we have adopted the plan as a package in the unique circumstances of this case. To give symmetry to systemwide employee relations and make the employee benefit plan practical for application throughout the system, and to place the nonsignatory employees in a position equivalent to those represented by the signatory unions, i.e., no better or worse; it will be necessary for the nonsignatory employees to make a commitment to the Transportation Company, in writing, indicating their agreement to the conditions and obligations here prescribed for their protection. If, within 30 days after the time he is first notified by the Company that he will be affected in his employment as a result of the merger, the nonsignatory employee fails to so indicate his intention as to protective benefits, he will be presumed to have chosen recourse to benefits in some way not a part of these conditions.

So that all nonsignatory employees will have adequate information upon which to act with regard to the employee protections afforded herein, the Transportation Company shall disseminate to them the terms stated herein and in the agreement of May 20, 1964. The dissemination shall be accomplished prior to or at the

same time notice is given as required in the preceding paragraph. The company shall, within 60 days after the effective date of our order herein, apprise this Commission of the steps being taken and material published to satisfy this requirement.

Employees of included carriers.—BLE contends that the employees of carriers included in this transaction under section 5(2)(d) should receive the benefits set out in the agreement of May 20, 1964. It cites section 2 of that agreement which provides that:

> In the event merger or control of other carrers not now involved in the aforesaid merger proceedings should be ordered by the Commission as a condition of its approval of the pending transaction, this agreement shall be subject to amendment by the parties so as to provide the employee benefits set forth in section 1 hereof to the employees of any such carrier controlled by or merged into the merged company.

Each of the inclusions for which we have made provision herein will be brought before the Commission in appropriate inclusion proceedings. In connection with those proceedings, it is presumed that the same amendments will be made as contemplated by the above quoted section 2. In any event, whether or not such amendments are made and voluntary agreement for employee protection reached in those proceedings, we shall make appropriate provision therein so that the employees affected by such inclusions as are accomplished, will have the protection due them under the law.

STATUTORY FINDINGS AND ULTIMATE CONCLUSIONS

To the extent that it will assume the obligations and liabilities of NYC and of other carriers as assumed by NYC, PRR (as the Transportation Company) will increase its fixed charges. There will, however, be no increase in the total fixed charges of the two applicants within the meaning of section 5(2)(e), and guarantee or assumption of the payment of dividends involved in the various leases or contracts of other carriers to be assumed will not be inconsistent with the public interest. Provisions have been made herein for those railroads seeking to be included in the transaction where such inclusion is shown to be in the public interest; and conditions have been imposed for the protection of railway employees entitled thereto. Adequate transportation service to the public will be assured by the transactions and as conditioned

herein, the transactions under consideration meet the requirements prescribed by sections 5(2) and 20a of the act, and conform generally with the purposes and objectives of the national transportation policy declared by Congress. We are convinced the transactions should be approved.

Our decision is based on the major issues involved. A number of the exceptions and arguments not referred to are obviously advanced only to provide, through collateral contentions, support for the principal position of a particular intervener. Such exceptions and arguments, although not always specifically discussed herein, have been considered and found to be without merit.

Although appendix U to the hearing examiners' report setting forth certain conditions recommended for approval of the instant merger is part of the report to be included in the bound volumes of our decisions, several of its conditions are in conflict with our own and are rejected. In order to avoid confusion attached as appendix A to this report is a list of conditions corresponding generally to those contained in appendix U of the initial report but modified to accord with our decision.

Subject to the various conditions set out in this report, including the appendixes, as well as to those referred to in the initial report not deleted or modified herein, we find (1) in Finance Docket No. 21989, (a) merger of the properties and franchises of The New York Central Railroad Company into The Pennsylvania Railroad Company, which as the surviving company intends thereafter to change its corporate name to the Pennsylvania New York Central Transportation Company, for ownership, management, and operation, (b) acquisition by The Pennsylvania Railroad Company, through the merger, of sole or joint control of the carriers then subsidiary to or affiliated with The New York Central Railroad Company, and (c) acquisition by The Pennsylvania Railroad Company of leases, contracts to operate properties of other carriers, and trackage rights, and terminals incident thereto, over the lines of other carriers now held jointly or otherwise by The New York Central Railroad Company as described herein and upon the terms and conditions found herein to be just and reasonable, are transactions within the scope of section 5(2) of the Interstate Commerce Act, will be consistent with the public interest, will enable The Pennsylvania Railroad Company to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition; and (2) in Finance Docket No. 21990,

in connection with the merger authorized herein, (a) issuance by The Pennsylvania Railroad Company of not exceeding 9,600,000 shares of common stock, of the par value of $10.00 per share, in exchange for the outstanding common stock of The New York Central Railroad Company and, as may be necessary, in connection with options to purchase stock of The New York Central Railroad Company outstanding and unexercised on the effective date of the merger, (b) issuance (including sale, pledge, or other disposition) by The Pennsylvania Railroad Company of other securities The New York Central Railroad Company shall have been authorized prior to the effective date of the merger to issue under section 20a of the Interstate Commerce Act, to the extent any such authorizations remain unexercised, and (c) assumption by The Pennsylvania Railroad Company of all obligations and liabilities of The New York Central Railroad Company in respect of securities issued by that carrier pursuant to authorizations under section 20a of the Interstate Commerce Act or as permitted by paragraph (9) of said section, and of securities of others in respect of which The New York Central Railroad Company shall have been granted authority to assume obligation or liability under section 20a of the Interstate Commerce Act prior to the effective date of the merger are (a) for lawful objects within the corporate purposes of The Pennsylvania Railroad Company and compatible with the public interest, which are necessary and appropriate for and consistent with the performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) reasonably necessary and appropriate for such purposes.

An appropriate order will be entered.

VICE CHAIRMAN TUCKER, concurring:

Although I concur without qualification in the Commission's approval of this merger and the conditions attached thereto, I feel compelled to point out that certain important aspects of this decision are not sufficiently explicit in the report of the majority. The considerations which prohibited me from subscribing to the Commission's earlier approvals of the Chesapeake & Ohio-Baltimore & Ohio railroad unification[1] and the Norfolk & Western-Nickel Plate-Wabash consolidation[2] now require that I call atten-

[1] *Chesapeake & O. Ry. Co.—Control—Baltimore & Ohio R. Co.*, 317 I.C.C. 261 (1962).

[2] *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1 (1964).

tion to these aspects in the context of the eastern railroad merger movement and the national rail unification picture of which it is a part.

On the day that the Commission approved the C&O-B&O unification, the success of this merger application became practically inevitable. When, in a separate decision a year and a half later, the Commission approved the unification of the N&W, Nickel Plate, and Wabash Railroads, any remaining doubt as to the outcome of the instant proceeding was removed. By its disposition of those two separate cases, the Commission effectively signified its complete acceptance of the principle of a predetermined three-system rail structure for the East. But it did this on a case by case basis, without having before it a picture of that three-system structure in its entirety.

As I have previously indicated in my separate expressions in the *C&O* and *N&W* cases,[3] consolidation of all the then-pending eastern rail merger proposals for decisional purpose would have yielded the Commission and the public a better choice of alternatives in evaluating the restructuring of the eastern railroad plant. It would have provided the Commission an opportunity to achieve faster and more equitable resolution of the problems of the so-called "small railroads" in the northeast, and thereby would probably have precluded the kind of difficult litigation which is now before the Commission with respect to the "inclusion" petitions of the Erie-Lackawanna Railroad, the Delaware and Hudson Railroad and the Boston and Maine Railroad.[4] In any event, a coordinated appraisal of the proposed eastern rail mergers, whatever the ultimate result, would have given this Commission—and thereby the public—a more realistic and effective role in the decisional process required by section 5(2) of the Interstate Commerce Act.

But in fact, a "panic button" response was sought—and achieved—when the C&O-B&O case was advanced before the Commission on the principal basis that B&O was on the verge of "collapse", and could only be saved by C&O's immediate assumption of its control. Once again that useful button was employed when N&W said it would lose its merger chance if

[3] 317 I.C.C. 261, at 293 and 324 I.C.C. 1, at 53.

[4] In accordance with the terms of one of the conditions imposed by the Commission in its approval in the *N&W* case, *supra*, the B&M, D&H, and E-L, on September 23, 24, and 28, 1965, respectively, filed petitions for inclusion in the N&W system. Hearings on these petitions are scheduled to begin on April 20, 1966.

the Commission failed to observe an approaching "deadline" on the parties' private agreements and stockholder authorization. Real doubt is cast on the validity of these arguments—which the Commission accepted without substantial reservation—by the 1962 Form A annual report of the B&O. Filed 3 months following approval of the C&O–B&O unification, it shows that B&O miraculously surged from a $31.3 million loss in net income for 1961 to a $1.6 million net income profit for 1962—even before it could become the recipient of C&O's "Good Samaritan" program.

And what of the other principal bases on which the Commission was urged to approve those earlier unifications and the instant merger on a case by case basis? After being continually advised by the proponents during these proceedings that the three-system idea would rationalize the eastern rail merger situation, the Commission now has been presented with a new unification proposal—a merger of the C&O and N&W,[5] two of the three resulting systems. No more need be said at this time about that unanticipated development.

In my view, it is evident that the resolution of the eastern railroad merger movement really has not been adequately attuned to the needs of the public in the East, or to the public interest in general. The lessons taught by the experience of these three cases should not be forgotten in the future. Individual rail merger proposals underlying the vast national rail unification movement in process today should not be allowed to follow the course of the gigantic game of dominoes we have witnessed in the East.

Although I feel concern over the course of events which has led the Commission into its present decisional posture, I see no alternative to approval of this proposal. In my view, neither the Pennsylvania Railroad nor the New York Central Railroad could withstand the tremendous competition of the N&W system and the C&O–B&O system, particularly in the event of any sustained economic recession, and it would be unrealistic and improper to understate that fact in this case.

Furthermore, in a balancing of the benefits and detriments of the present transaction, the New Haven Railroad problem must be given very substantial weight. The newly merged railroad corporation enabled herein will provide a framework for preservation of an important rail plant—serving four States in a highly populous area—which, but for this unification, might face liquida-

[5] Finance Docket Nos. 23832 and 23833, Norfolk & Western Railway Co. and Chesapeake & Ohio Railway Co. Merger Application, filed October 11, 1965.

tion. The New Haven Railroad is the fourth largest private carrier of passengers in the world. Its freight revenues alone exceed the total revenues of either of the B&M, D&H, Jersey Central, Susquehanna, or Western Maryland railroads.

In and of itself, then, the risk of leaving the Pennsylvania Railroad and the New York Central separately to face the powerful competition of the two existing consolidated Eastern railroad systems outweighs by far the arguments against this merger. And, with the opportunity it presents to assist in the revitalization of the New Haven's rail operations, no realistic argument remains against this merger.

Lastly, I hope that our approval herein will not be misconstrued. In cases as big and as publicly significant as this, essentially procedural matters must not be allowed to control the substance of the ultimate result. The Commission henceforth will resolve comparable cases with, I hope, the benefit of some important lessons learned.

COMMISSIONER FREAS, dissenting in part:

I do not subscribe to the condition relating to the payment of indemnities.

APPENDIX A

Certain conditions to approval imposed in lieu of the conditions set forth in appendix U to the hearing examiners' report

1. It shall be the duty and obligation of the Pennsylvania New York Central Transportation Company (the merged company) to simplify its intercorporate structure. Within 5 years from the effective date of this order approving merger, the merged company shall submit a verified statement to this Commission indicating what steps have been taken to simplify its intercorporate structure and where subsidiaries or affiliates remain to state the purpose and reason for their existence. The Commission reserves jurisdiction to issue such supplemental orders to effectuate substantial simplification of the merged company's intercorporate structure as it may determine to be in the public interest.

2. The Pennsylvania New York Central Transportation Company shall be required within 2 years from the date of consummation to submit a plan for the revision of certificates and/or permits now issued to or to be issued in the interim to the Pennsylvania Truck Lines, Inc., The Penntruck Company, Inc., Merchants Trucking Company, and New York Central Transportation Company (1) to reflect the name of the merged company where appropriate; and (2) to eliminate such duplications or inconsistencies as between authorities held by such separate corporations. Jurisdiction is reserved to this Commission on its own motion to require consolidation of any or all the above-named motor carriers if such action is deemed to be in the public interest.

3. The Pennsylvania New York Central Transportation Company shall be required to provide employees not now covered and to the extent contemplated under section 5(2)(f) of the act with the basic protection as particularly described in a contract entered into between applicants and various labor organizations dated May 20, 1964, as introduced in this record.[1] In the event any employee or employee representative elects not to accept such protection in writing, within 30 days after being notified by the Transportation Company that such employee or employees represented by such representative will be affected, it will be presumed that he has elected to seek benefits on a basis other than that prescribed herein. The Transportation Company shall apprise the affected employees of the protections provided herein, as more fully set out in the report herein.

4. The merged company shall be required to accept an agreement dated March 4, 1959, as amended March 13, and 31, 1959, with and between Seatrain Lines, Inc., New York Central Railroad Company, and New York, Susquehanna and Western Railroad Company providing for establishment of rail-water-rail rates and divisions therefor as more fully described in the initial report.

5. Pennsylvania New York Central Transportation Company shall maintain at a level no higher than present dollar levels those payments to be made by the Chicago & Eastern Illinois Railroad Company for the exercise of its trackage rights between Pana and Granite City, Ill. This requirement should remain in effect for 1 year after the effective date of the proposed rerouting of traffic under the merger plan to and from East St. Louis, Ill.-St. Louis, Mo., now carried by New York Central Railroad Company over its lines to the present lines of the Pennsylvania Railroad Company, to permit the merged company and the Chicago & Eastern Illinois Railroad to negotiate a fair and equitable arrangement concerning use by the latter of the merged company's trackage between Pana and Granite City, Ill. If at the end of such time period the parties are unable to agree on the charges or rental to be paid, application may be made to this Commission for an order fixing such terms and conditions, all subject to approval and authority by this Commission under section 5.

6. The Pennsylvania New York Central Transportation Company shall be required to include in this transaction the operations of the New York, Susquehanna and Western Railroad Company as contemplated by section 5(2)(d) of the act upon such fair and equitable terms as the parties may agree subject to Commission approval or in the event they disagree, upon such terms and conditions as this Commission may impose. In arriving at the terms of inclusion, the parties are to negotiate with the Reading Company, The Central Railroad Company of New Jersey, the Western Maryland Railway, and The Delaware and Hudson Railroad Corporation concerning the amount of traffic of those railroads subject to diversion by reason of the inclusion and as to conditions necessary to protect existing routes and gateways. In the event the parties fail to agree on such matters, the Commission may, upon request of any of said parties, or on its own motion, consider and determine issues regarding traffic diversion and the protective conditions required, all in connection with its disposition of the question of inclusion.

7. The Commission, for a period of 5 years following the consummation of the merger, will retain jurisdiction to entertain a petition by Brooklyn Eastern

[1] Not applicable to employees of railroads for which inclusion has been provided and jurisdiction has been reserved to provide protection.

District Terminal Railroad for inclusion in this transaction showing how and to what extent the petitioner is injured as a result of this merger. Pennsylvania New York Central Transportation Company will be required to negotiate in good faith with respect to proposals presented to it by Brooklyn Eastern District Terminal Railroad. In the event the parties are unable to agree and the Commission after hearing concludes that inclusion of Brooklyn Eastern District Terminal Railroad would be consistent with the public interest, it will issue an order directing the Pennsylvania New York Central Transportation Company to include the Brooklyn Eastern District Terminal Railroad upon such terms and conditions as the Commission finds just and reasonable.

8. The Pennsylvania New York Central Transportation Company shall be required to include in the transaction all the New York, New Haven and Hartford Railroad Company—the inclusion of passenger operations being subject to the findings and determinations of the Commission as set forth in Finance Docket No. 23631 issued simultaneously with this report—upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission. Within 6 months after the date this report is served, the parties shall file with the Commission for its approval, a plan for such inclusion. In the event the parties are unable to reach an agreement (and subject to approval by the Bankruptcy Court) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose.

In arriving at terms of inclusion, the parties are to negotiate with the Reading Company, The Central Railroad Company of New Jersey, and the Western Maryland Railway concerning the amount of traffic of those railroads subject to diversion by reason of the inclusion and as to any conditions necessary to protect existing routes and gateways. In the event parties fail to agree on such matters, this Commission may, upon request of any of said parties, or on its own motion, consider and determine the traffic to be diverted and the protective conditions required, all in connection with its disposition of the question of inclusion.

Jurisdiction is hereby reserved for such purposes. Consummation of the merger by applicants shall indicate their full and complete assent to these requirements.

9. For a period of 1 year following a final order or judgment denying the petitions of the Boston and Maine Corporation, Erie-Lackawanna Railroad Company and/or The Delaware and Hudson Railroad Corporation for inclusion in *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1, the Commission will retain jurisdiction to receive from the said petitioners and Pennsylvania New York Central Transportation Company supplemental petitions for inclusion herein, as described in the attached report. In the event no agreement is reached by the parties within the prescribed time, jurisdiction is retained for the Commission upon its own motion to proceed as may be deemed necessary to determine whether inclusion herein would be consistent with the public interest, and, if so, appropriate terms therefor.

10. The Pennsylvania New York Central Transportation Company, its subsidiaries and affiliates shall be required within 2 years of consummation herein, except as has been provided for in the Commission's order, dated June 24, 1964, in Finance Docket No. 21510, *Norfolk and Western Railway*

Company and New York, Chicago and St. Louis Railway Company—Merger, etc., (1) to divest all interest, stock or bond, absolute or contingent, in those railroad corporations considered by the hearing examiners in appendix T-2, of the initial report, except the Lehigh Valley Railroad Company, as being affiliated with or subsidiary to the Chesapeake and Ohio Railway Company, and the Norfolk and Western Railway Company, including their prospective affiliates Erie-Lackawanna Railroad Company, Boston and Maine Railroad, and Delaware and Hudson Railroad Corporation and (2) without specific approval of this Commission, to refrain from acquiring by purchase or otherwise any such interest in the future in present or prospective affiliates and subsidiaries of either system as set forth in said appendix T-2. Pending disposal of any stockholdings in such carriers, the Pennsylvania New York Central Transportation Company, its affiliates and subsidiaries shall place such capital stock as it may hold in independent voting trusts which shall be effective no later than the date of consummation here, subject to prior approval by this Commission. None of the stock or bonds for which divestiture is ordered shall be sold, transferred or otherwise disposed of to Alleghany Corporation, Investors' Diversified Services, Inc., or their respective subsidiaries or affiliates; and the Pennsylvania New York Central Transportation Company shall file annual reports with the Commission, on each anniversary of the effective date of the order of merger approval, describing steps taken to dispose of the stock or bonds, the number and kinds of shares or other interest yet to be disposed of.

11. Pennsylvania New York Central Transportation Company and its affiliates and subsidiaries shall be required (1) to enter into reciprocal switching arrangements with all rail carriers in the Pittsburgh Switching District, Alleghany County, Pa., who desire such arrangements, to permit mutual access by the said Transportation Company, its affiliates and subsidiaries and such other railroads to plants, tracks and sidings located therein served by each or their affiliates and subsidiaries and (2) to join in such applications as may be necessary under sections 5 and 1(18) to obtain authorization for or to permit the construction of such connecting track and connections as may be necessary to accomplish the access as may be agreed to, under such terms and conditions as may be agreed upon between the parties or in the event no agreement can be made, upon such terms and conditions as the Commission may impose.

12. Pennsylvania New York Central Transportation Company and its subsidiary, the Lehigh Valley Railroad Company, shall be required (1) to propose negotiations and if such offer is accepted to negotiate in good faith with Chesapeake and Ohio Railway Company, its affiliates and/or subsidiaries with respect to inclusion of the Lehigh Valley Railroad Company in the Chesapeake and Ohio Railway Company; (2) to file or join in the necessary applications or pleadings including petitions for inclusion in any appropriate proceeding to bring about the inclusion of Lehigh Valley Railroad Company in the Chesapeake and Ohio Railway Company and (3) to cooperate to the fullest extent in the development of an adequate record to provide a basis for the required determination by this Commission as to whether such a transaction would be in the public interest. In the event such matter is presented and if after hearing, it is determined by the Commission that such transaction is consistent with the public interest and the parties thereto are unable to agree,

the Commission shall impose such terms and conditions as it deems just and reasonable, and such action shall be binding on the Pennsylvania New York Central Transportation Company.

13. After October 16, 1969, or upon issuance of an order by this Commission denying the petition of Erie-Lackawanna Railroad Company for inclusion in the Norfolk and Western Railway Company, Pennsylvania New York Central Transportation Company and its subsidiary, the Lehigh Valley Railroad Company, shall be required (1) to negotiate in good faith with the Norfolk and Western Railway Company, its affiliates and/or subsidiaries with respect to inclusion of the Lehigh Valley Railroad Company in the Norfolk and Western Railway Company; (2) to file such applications or other pleadings as may be necessary to bring about the inclusion of Lehigh Valley Railroad Company in the Norfolk and Western Railway Company; and (3) to cooperate to the fullest extent in the development of a record to provide a basis for the required determination by this Commission as to whether such a transaction will be in the public interest. In the event such matter is presented within ten years from the date of consummation here, and if after hearing, the Commission determines that such transaction is consistent with the public interest and that parties thereto are unable to agree, the Commission will impose such terms and conditions as it deems just and reasonable and such action shall be binding upon the Pennsylvania New York Central Transportation Company.

14. Until otherwise relieved by this Commission, Pennsylvania New York Central Transportation Company shall retain its stock and other holdings to the degree now maintained in Lehigh Valley Railroad Company and render such support, financial and otherwise, as the Commission, from time to time, may determine necessary to keep such railroad operational. If at the end of ten years from the consummation of this transaction or such reasonable time as the Commission may determine, the inclusion of the Lehigh Valley Railroad Company in the Chesapeake and Ohio Railway Company, its subsidiary and affiliates or in the Norfolk and Western Railway Company, its subsidiaries and affiliates has not been accomplished, and if after hearing, upon its own motion or upon a section 5 application, the Commission determines that inclusion of Lehigh Valley Railroad Company in the instant transaction, through merger or otherwise, is consistent with the public interest, the Commission shall order such inclusion upon such terms as may be found just and reasonable and such action shall be binding upon the Pennsylvania New York Central Transportation Company.

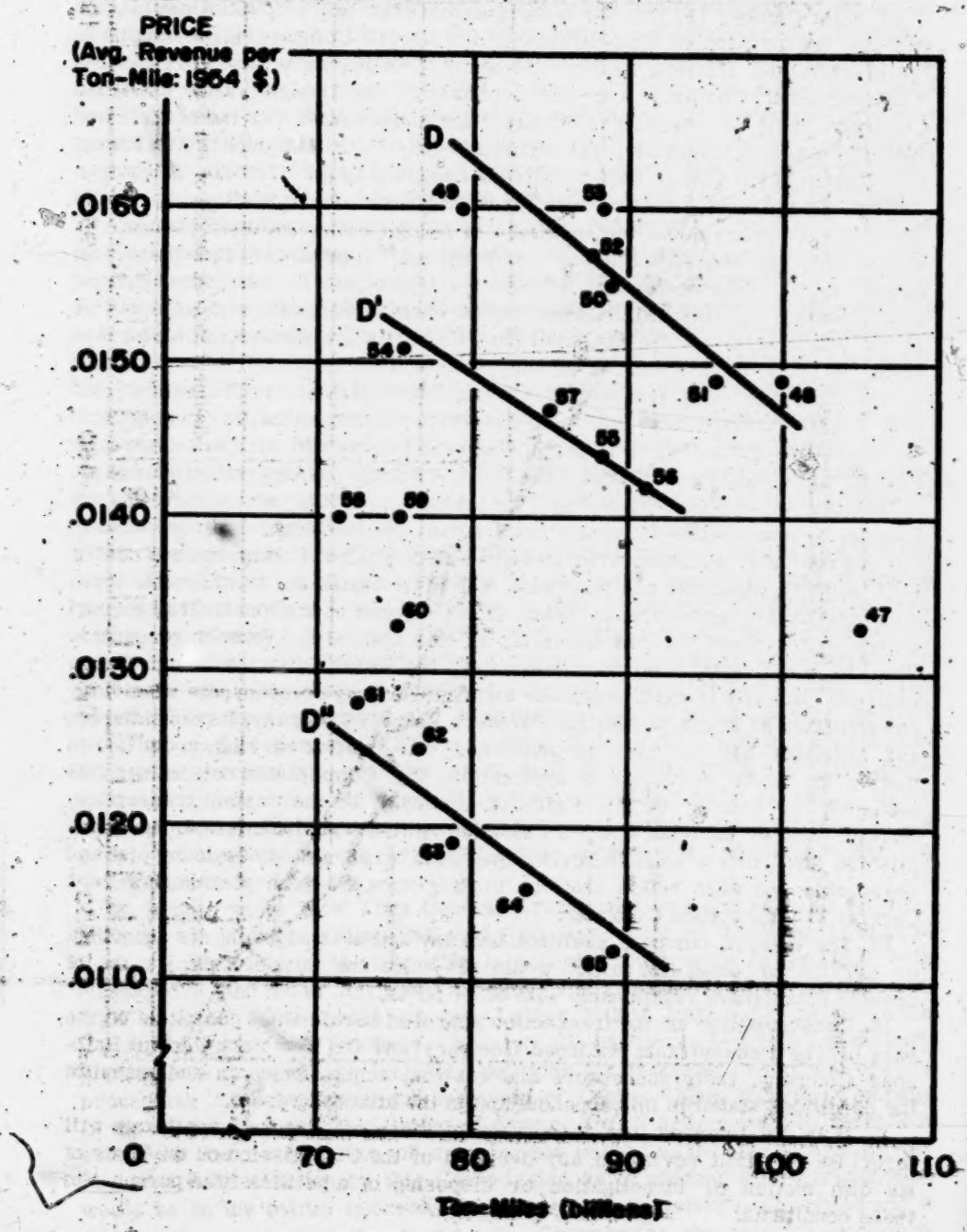
15. The merged company shall not take any action in adjusting its schedules, or service or otherwise which would prejudice the Port of Erie, Pa., in its present competitive relationship with other ports.

16. Consummation of the transaction approved herein shall constitute on the part of The Pennsylvania Railroad Company and the New York Central Railroad Company, their successors and assigns, acquiescence in and assent to the conditions stated in this appendix and in the attached report.

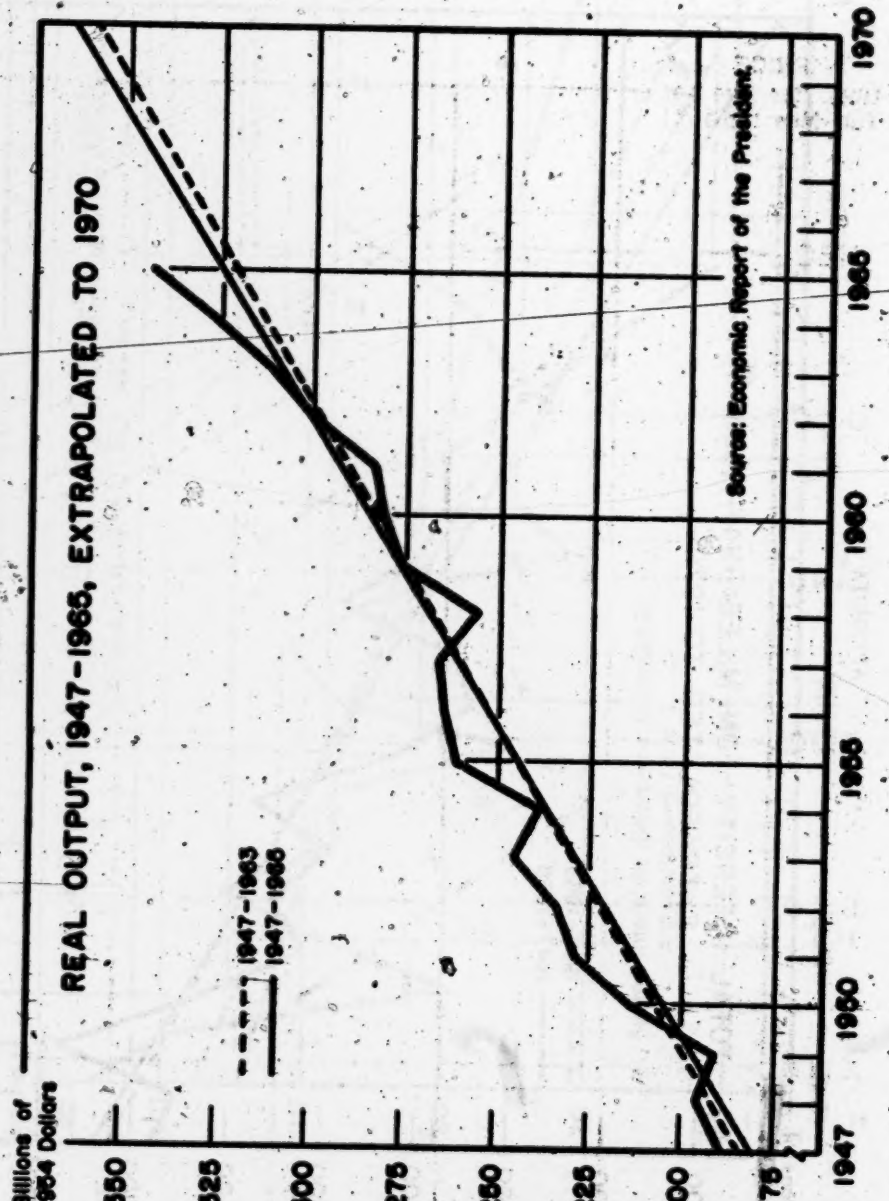
17. It is not intended that acceptance of these conditions by applicants will foreclose or limit review of any decision of the Commission on the basis of its own motion or investigation or disposing of a petition filed pursuant to these conditions.

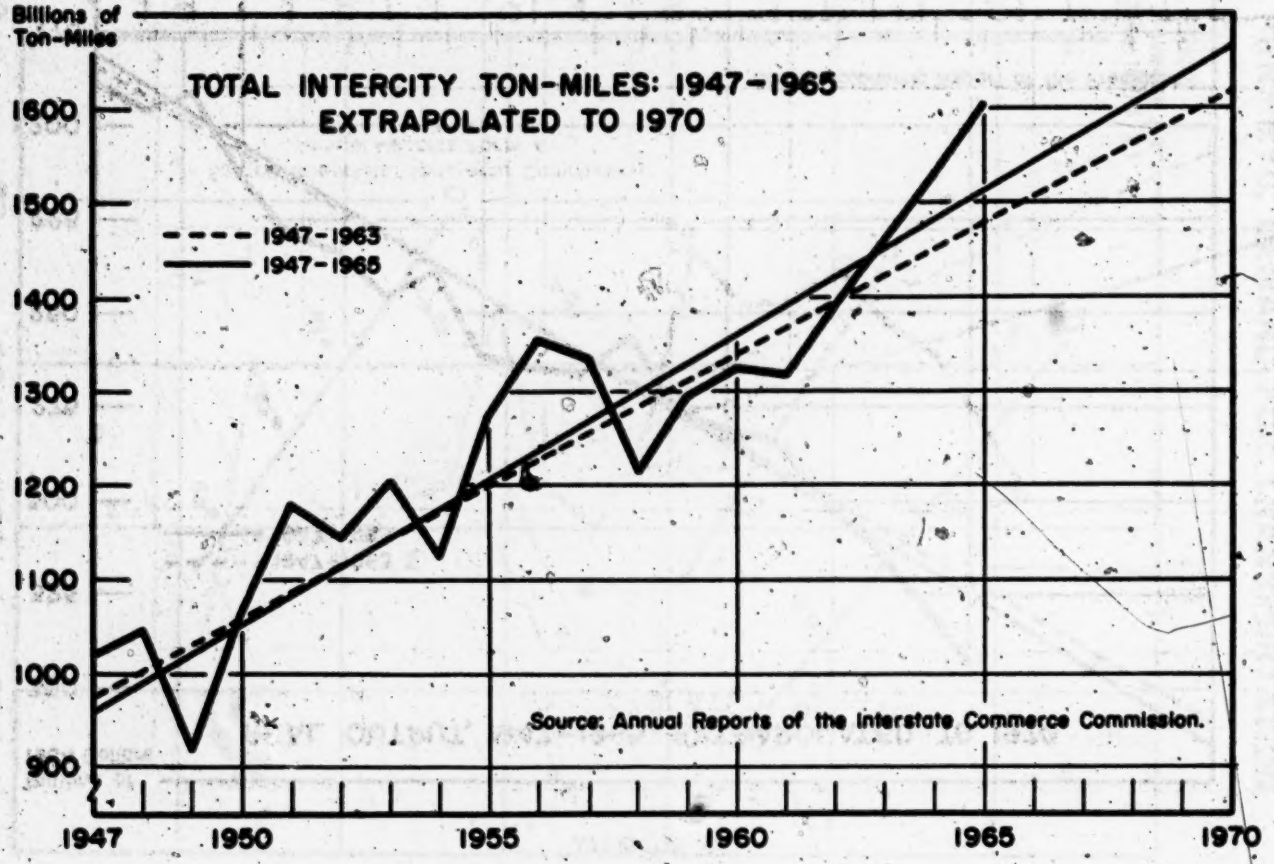
APPENDIX B

PRR-NYC, DEMAND FOR TRANSPORTATION

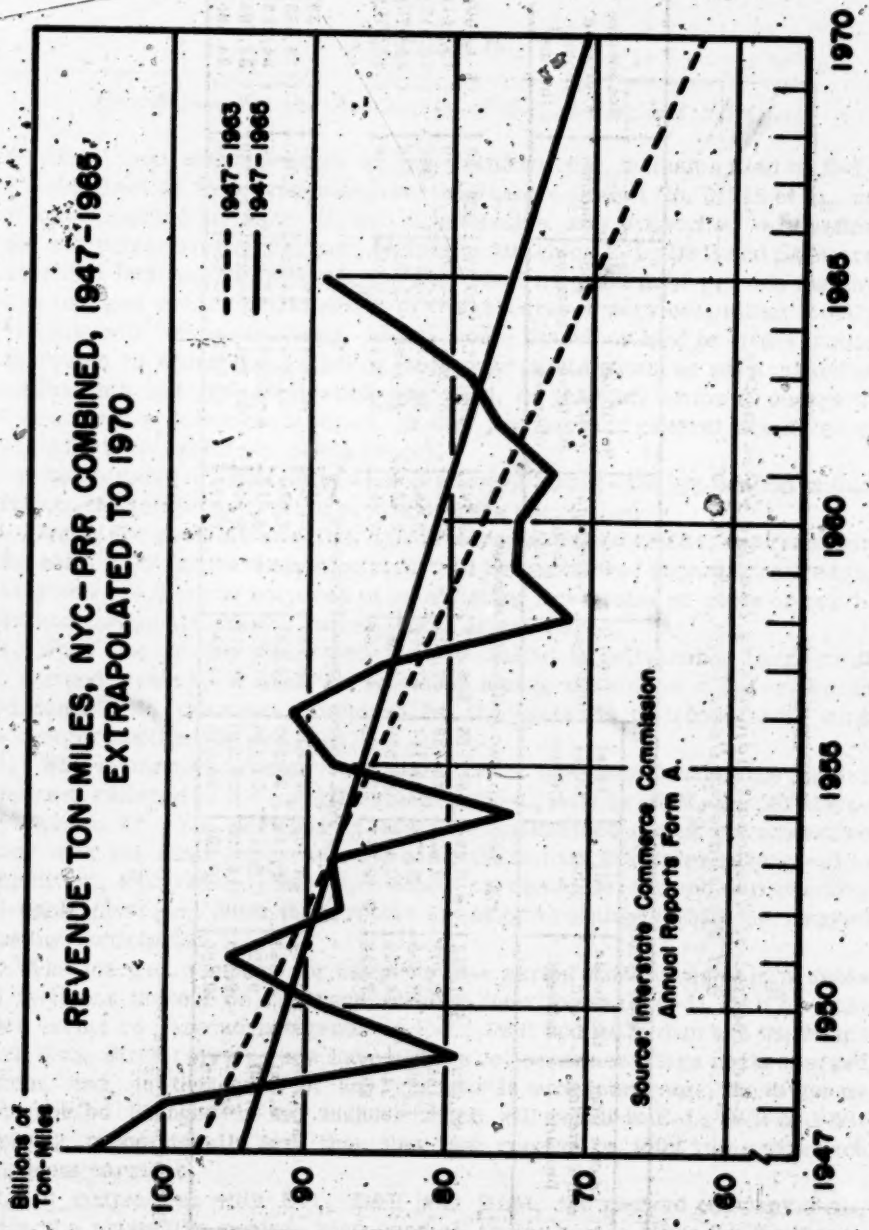


APPENDIX C


REAL OUTPUT, 1947–1965, EXTRAPOLATED TO 1970
Billions of 1964 Dollars
350
325
300
275
250
225
200
175
1947
1950
1955
1960
1965
1970
1947–1963
1947–1965
Source: Economic Report of the President.


Billions of Ton-Miles
TOTAL INTERCITY TON-MILES: 1947-1965
EXTRAPOLATED TO 1970
1947-1963
1947-1965
1600
1500
1400
1300
1200
1100
1000
900
1947
1950
1955
1960
1965
1970
Source: Annual Reports of the Interstate Commerce Commission.

APPENDIX E


REVENUE TON-MILES, NYC–PRR COMBINED, 1947–1965,
EXTRAPOLATED TO 1970
1947–1963
1947–1965
Billions of Ton-Miles
100
90
80
70
60
1947
1950
1955
1960
1965
1970
Source: Interstate Commerce Commission
Annual Reports Form A.

APPENDIX F

Net Income of Applicants Adjusted to Exclude Other Income and Miscellaneous Deductions from Income

Year	Net railway operating income	Other Income				Total income	Misc. deductions from income	Net income available for fixed charges	Total fixed charges	Net income	Net income exluding other income[1]
		Income from non-operating property	Dividends and interest	All other	Total Other income						
The Pennsylvania Railroad Company:											
1964 --	$39,184	$1,072	$25,352	$10,694	$37,118	$76,302	$6,795	$69,507	$40,374	$29,133	($ 1,190)
1963 --	28,813	1,155	19,405	8,229	28,789	57,602	7,079	50,524	41,365	9,159	(12,551)
1962 --	17,909	1,329	19,800	8,028	29,157	47,066	8,055	39,011	42,221	(3,210)	(24,312)
1961 --	17,833	944	24,472	10,184	35,550	53,383	6,964	46,419	42,903	3,516	(25,070)
1960 --	4,227	506	19,926	19,397	39,829	44,056	7,935	36,121	43,940	(7,819)	(39,713)
The New York Central Railroad Company:											
1964 --	34,170	$11,766	10,951	7,101	29,819	63,989	2,335	61,654	34,608	27,046	(438)
1963 --	21,120	8,881	8,853	6,119	23,503	44,623	2,630	41,994	34,954	7,040	(13,833)
1962 --	12,616	9,090	9,805	5,741	24,436	37,052	4,017	33,035	36,871	(3,836)	(24,255)
1961 --	(493)	5,011	9,476	14,423	28,910	28,417	2,696	25,721	38,270	(-12,549)	(38,763)
1960 --	16,168	5,736	12,686	10,393	28,815	44,983	3,292	41,691	40,653	1,038	(24,465)

[1] Represents net income excluding total other income less miscellaneous deductions from income.

( ) Deficit

APPENDIX G

Provisions for the Protection of E-L, D&H, and B&M.

1. Pending final determination of the petitions for inclusion filed by E-L, D&H, and B&M in this proceeding and in Finance Docket No. 21510 et al., or such other period of time as the Commission may prescribe, hereinafter called the protective period, and on traffic for which E-L, D&H and B&M are competitive factors, the merged company shall not publish or provide for any new or changed routing practice and/or freight rates or services, either locally or jointly with other carriers, which would divert or tend to divert traffic from routes in which E-L, D&H or B&M, now participates, or participated at the time this merger application was filed, or take any action or engage in any practice or conduct contrary to the purpose and general objectives of this condition as explained in this report.

For the purpose of illustrating—but in no way limiting—the application of this condition, the following specific provisions are prescribed:

A. During the protective period, and as to the described traffic, the railroads which shall make up the merged system will be considered separate railroads, as they now are, for the purposes of establishing new routes or rates or privileges and changes in present routes, rates or privileges.

B. When any of the described freight traffic is delivered to carriers of the merged system, it shall be allocated among the routes of the system in accordance with practices employed by the system's railroads at the time this merger application was filed.

C. Where through routes and joint rates are now in existence via any component railroad of the merged system and E-L, D&H or B&M, the participation therein of such components shall be maintained during the protective period with the same vigor as such components have heretofore exercised in competition with each other and other carriers, to the end of preventing noticeable diversion from such routes to any other route in which the merged company participates.

D. The merged company for the protective period shall agree to joint rates and divisions thereof on its freight traffic interlined with E-L, D&H or B&M under terms no less advantageous to E-L, D&H and B&M than are the terms which those three carriers now have with the component carriers of the merged system, and, in the event of any changes in such joint rates, the divisions shall not be changed in any manner which will result in E-L, D&H or B&M receiving proportionally less than they now receive on joint rates with such component carriers.

E. In conjunction with E-L, D&H and B&M, the merged company shall, during the protective period, keep open all routes now in force for the transportation of freight over the lines of the three companies and the component carriers of the merged system; shall maintain thereon service equal to or better than that being given on the date this merger application was filed; shall improve such service, to the extent within its power, at least as necessary to make the said through rutes fully competitive with other routes in which the merged company participates; and, where joint rates are now in effect or were in effect when this merged application was filed, it shall maintain

such rates; and where change in those rates becomes appropriate, changes shall conform to the requirement of provision D above.

2. The term "competitive factor" shall be construed to mean that at the date of this order or at the time this merger application was filed, E-L, D&H or B&M was both participating in the particular route, rate or service and was handling traffic thereon.

3. E-L, D&H and B&M shall be indemnified by the merged company under the circumstances and according to the plan specified in the report, *supra*.

4. This appendix constitutes a plan for protection against the effects of the applicants' merger and does not apply to loss caused by: (a) hostile or warlike action by (1) any government or sovereign power (*de jure* or *de facto*) or (2) military, naval or air forces; (b) insurrection, rebellion, civil war, et cetera; (c) national disaster; (d) economic depression; (e) strikes; (f) act of God; or (g) other similar state of affairs.

5. The interpretation, application and enforcement of the conditions in this appendix shall be governed exclusively by the following provisions:

A. All controversies arising under this appendix shall be determined with finality by the Interstate Commerce Commission in the manner indicated below.

B. (1) Except as to section 3, *supra*, whenever E-L, D&H or B&M considers that these protective conditions are being violated, or that a violation will result from the effectuation of a tariff publication in which the merged company participates, they may (individually or collectively) file a complaint with the Commission, Board of Suspension, and with the merged company, specifying the rate, route, practice, privilege, or such matters constituting the alleged violation and setting forth in a statement verified by an appropriate official of the complainant all the data giving rise to the complaint.

(2) In the event the Board of Suspension shall determine that, as to the matter complained of, E-L, D&H or B&M is a competitive factor (as defined in these conditions), it shall in the case of a tariff publication not yet effective, suspend the tariff forthwith for the protective period (as defined in these conditions), and shall conduct an investigation into the matter complained of; and if the alleged violation is found not to exist, the Board shall thereupon order the suspension removed; and, in all matters not involving a tariff not yet in effect, the Board shall investigate the matters complained of; and, if in any investigation, it finds that these protective conditions are being violated, it shall order the cancellation of the violative tariff provisions or, where a tariff is not involved, the termination of the violative conduct. Orders of the Board shall have force and effect as orders of this Commission and shall be enforced as such.

C. All controversies arising under section 3 above, shall be determined by the Commission, Finance Board No. 2. Complaints, verified by an appropriate officer of the complainant, shall be addressed to such Board and the merged company, specifying both the basis of the complaint and the relief sought.

D. (1) All determinations as to whether E-L, D&H or B&M is a competitive factor shall be made within 10 days after a complaint is filed; and final decisions as to issues raised by a complaint shall be rendered within 90 days after the complaint is filed.

(2) Appeal shall lie to the Commission, division 2, from orders of the Board of Suspension; and to the Commission, division 3, from orders of Finance Board No. 2.

(3) Special rules for proceeding before the Boards and appealing therefrom shall be promulgated by this Commission at a future time.

6. Notwithstanding the provisions of sections 1, 2, 3, 4, and 5, an agreement pertaining to the interests of E-L, D&H and/or B&M may be hereinafter entered by the merged company and the protected carriers, or any of them, which shall supersede the protection provided by such sections to the extent the agreement does not violate the provisions of the Interstate Commerce Act or the Commission's rules and regulations thereunder.

7. In the event applicants fail to accede to the above-named conditions, consummation of the proposed merger will be deferred for 2 years or such time as the Commission may determine to be necessary to protect the interests of D&H, B&M and E-L.

8. These conditions shall be construed, administered and enforced with the view to protecting the E-L, D&H, and B&M and the shipping public which depends upon them for transportation, against the effects of the merger for the period and purposes set forth above.

9. These conditions are to be applied in addition to the standard conditions set out in appendix I hereof.

APPENDIX H

1. Upon consummation of the transaction proposed in Finance Docket No. 21989, the P&LE, PRR and Western Maryland shall, with respect to each other, maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Interstate Commerce Commission.

2. The present neutrality of handling of traffic inbound and outbound by P&LE shall be continued by PRR and P&LE to permit equal opportunity for service to and from the lines of Western Maryland without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise. Likewise, the present neutrality of handling traffic inbound and outbound by Western Maryland shall be continued so as to permit equal opportunity for service to and from the lines of P&LE and PRR without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between P&LE, on the one hand, and Western Maryland, on the other, shall be continued insofar as such matters are within the control of PRR, P&LE or Western Maryland.

4. PRR undertakes that P&LE will accept, handle and deliver all cars inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from Western Maryland and carriers competing with Western Maryland, and irrespective of the destination or routes of movement. Likewise, Western Maryland will accept, handle and deliver all cars inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from P&LE and carriers competing with P&LE and irrespective of destination or route of movement.

5. Neither PRR nor P&LE shall do anything to restrain or curtail the rights of industries now located on P&LE to route traffic over any or all existing

routes and gateways in connection with Western Maryland. Likewise Western Maryland shall not do anything to restrain or curtail the rights of industries now located on its lines to route traffic over any or all existing routes and gateways in connection with P&LE.

6. P&LE, PRR and Western Maryland agree that they will cooperate with each other and each will use its best efforts with its connections to obtain similar cooperation in order to continue the P&LE-Western Maryland route as a fast, competitive service route for the movement of freight traffic between points located on or beyond P&LE's lines and points located on or beyond Western Maryland's lines, endeavoring at all times to improve such service, and maintaining at least the same standards of service as prevailed on the date hereof; and neither of the parties will, without the written consent of the other, make any substantial change in schedules where the effect of such change would be to increase the time in transit via the aforesaid route, or to otherwise adversely affect the standards of service; *provided, however,* that if all other obligations of these conditions have been complied with, this paragraph shall not be construed to require the maintenance of train service or schedules if revenues from operations between Youngstown and Connellsville or between Connellsville and Cumberland during any 6 months' period have been insufficient to cover out-of-pocket costs.

7. The parties will continue to publish or concur in the publication of rates so that rates to and from points on or reached via Western Maryland's route will always be competitive with other routes [and they shall also concur in divisions of such rates under the established basis of divisions].

8. P&LE, PRR and Western Maryland will cooperate with each other in solicitation of traffic for which the route via P&LE and Western Maryland provides competitive rates and services.

9. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceedings on our own motion for this same purpose.

APPENDIX I

1. The merged company shall maintain and keep open all routes and channels of trade via existing junctions and gateways unless and until otherwise authorized by this Commission.

2. The present neutrality of handling traffic inbound and outbound by PRR and NYC shall be continued by the merged company so as to permit equal opportunity for service to and from all lines reaching the rails of the merged company without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between PRR and NYC, on the one hand, and all lines connecting with their tracks, on the other, shall be continued by the merged company insofar as such matters shall be within its control.

4. The merged company shall accept, handle and deliver all cars, inbound and outbound, loaded and empty, without discrimination in promptness or

frequency of service as between cars destined to or received from competing carriers, and irrespective of destination of route of movement.

5. The merged company shall not do anything to restrain or curtail the right of industries now located on PRR or NYC to route traffic over any or all existing routes and gateways.

6. Any party or any person having an interest in the subject matter may, at any future time, make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained by this Commission to reopen the proceeding on our own motion for the same purpose.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of April 1966.

Finance Docket No. 21989

PENNSYLVANIA RAILROAD COMPANY--MERGER--
NEW YORK CENTRAL RAILROAD COMPANY

Finance Docket No. 21990

PENNSYLVANIA RAILROAD COMPANY STOCK ISSUANCE

Investigation of the matters and things involved in these proceedings having been made, a hearing and oral argument having been held, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, and its dispositions of various pleadings, which report and the report of the hearing examiners, are hereby referred to and made a part hereof:

It is ordered, That in Finance Docket No. 21989, subject to the conditions referred to in said report of the Commission, including the appendixes thereto, and those conditions recommended by the hearing examiners and not modified or rejected by the Commission, (a) merger of the properties and franchises of The New York Central Railroad Company into The Pennsylvania Railroad Company, which as the surviving company intends thereafter to change its corporate name to the Pennsylvania New York Central Transportation Company, for ownership, management, and operation; (b) acquisition by The Pennsylvania Railroad Company, through the merger, of sole or joint control of the carriers then subsidiary to or affiliated with The New York Central Railroad Company; and (c) acquisition by The Pennsylvania Railroad Company of leases, contracts to operate properties of other carriers, and trackage rights, and terminals incident thereto, over the lines of other carriers now held jointly or otherwise by The New York Central Railroad Company, all under the terms and conditions in said report of the Commission found just and reasonable be, and they are are hereby, approved and authorized;

It is further ordered, That in Finance Docket No. 21990, subject to the conditions in the aforesaid report of the Commission applicable thereto, The Pennsylvania Railroad Company is authorized (a) to issue not exceeding 9,600,000 shares of its common stock of the par value of $10.00 per share in exchange for the outstanding common stock of The New York Central Railroad Company, at the rate of 1.3 shares of The Pennsylvania Railroad Company stock for each share of The New York Central Railroad Company stock, and, as may be necessary, in connection with options to purchase stock of The New York Central Railroad Company outstanding and unexercised on the effective date of the merger; (b) to issue (including sale, pledge, or other disposition) other securities The New York Central Railroad Company shall have been authorized prior to the effective date of the merger to issue under section 20a of the Interstate Commerce Act, to the extent any such authorizations remain unexercised; and (c) to assume all obligations and liabilities of The New York Central Railroad Company in respect of securities issued by that carrier pursuant to authorizations under section 20a of the Interstate Commerce Act or as permitted by paragraph (9) of said section, and of securities of others in respect of which The New York Central Railroad Company shall have been granted authority to assume obligation or liability under section 20a of the Interstate Commerce Act prior to the effective date of the merger, all upon the terms and for the purposes described in the aforesaid report of the Commission;

It is further ordered, That The Pennsylvania Railroad Company report concerning the matters herein involved in conformity with the order of the Commission, division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 56.4 and 56.6);

It is further ordered, That, except as herein authorized, said stock authorized hereby to be issued shall not be sold, pledged, repledged, or otherwise disposed of by The Pennsylvania Railroad Company unless or until so ordered or approved by this Commission;

It is further ordered, That, if the authorities herein granted are exercised, The Pennsylvania Railroad Company shall submit

for the consideration of this Commission three copies of the journal entries required to record the transactions and confirm in writing to this Commission immediately after consummating the transactions authorized in Finance Docket No. 21989, the effective date of such consummation;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States;

It is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders herein as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in said report of the Commission and to those orders which may be issued under section 5(9) of the Interstate Commerce Act; and

It is further ordered, That this order shall take effect and be in force from and after 35 days from the date of its service and that if the authorities granted in Finance Docket No. 21989 are not exercised within 120 days from said effective date, this order shall be of no further force or effect.

By the Commission.

H. NEIL GARSON

(SEAL) Secretary

APPENDIX B

Provisions of Judicial Code (Title 28 U.S.C.) Relating to Judicial Review of Commission Order.

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1336. Interstate Commerce Commission's orders

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final. As amended Aug. 30, 1964, Pub.L. 88-513, § 1, 78 Stat. 695.

§ 1398. Interstate Commerce Commission's orders

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue. As amended Aug. 30, 1964, Pub.L. 88-513, § 2, 78 Stat. 695.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

* * * *

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State

court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. As amended June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

§ 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States. As amended May 24, 1949, c. 139, § 115, 63 Stat. 105.

§ 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be

represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. As amended May 24, 1949, c. 139, § 116, 63 Stat. 105.

§ 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

§ 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. As amended June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

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The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be

represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. As amended May 24, 1949, c. 139, § 116, 63 Stat. 105.

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§ 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

APPENDIX C

Pertinent Provisions of Section 5 of the Interstate Commerce Act (Title 49 U.S.C. § 5).

§ 5. Combinations and consolidations of carriers

Pooling; division of traffic, service, or earnings

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinon, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by

order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle

are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving

a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

* * * *

Control effected by other than prescribed methods

(4) It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

Supplemental orders by Commission

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

Plenary nature of authority under section

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation

participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

APPENDIX D

Pertinent Provisions of the Administrative Procedure Act.

§ 5(a), 5 U.S.C. § 1004(a)

Notice of hearing and issues

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

§ 5(b), 5 U.S.C. § 1004(b)

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 7(c), 5 U.S.C. § 1006(c)

Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

• • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

§ 8(b), 5 U.S.C. § 1007(b)

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

* * * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the

record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

§ 10, 5 U.S.C. § 1009

Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency

action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are

subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX E

The Present Appendix G Traffic Conditions.

As a preliminary to an analysis of the Appendix G traffic conditions, certain comments are in order.

First, the attempt to have the Penn-Central merger consummated and to protect E-L, D&H and B&M from adverse effects of its impact inevitably presented a very complex problem or set of problems. That fact cannot be swept away by referring to general language in the April 6 Report (327 I.C.C. at 531-533) or even to general language in the first paragraph of Appendix G (327 I.C.C. at 561). The Commission recognized the need to be as specific as possible by including in section 1 of Appendix G paragraphs A through E, which take up almost a third of the entire text of Appendix G (327 I.C.C. at 561).

The intrinsic difficulties arise out of the fact that after the merger there would be a single railroad company, instead of two, whose management would naturally utilize all the advantages of a unified ownership and unified operation to wean traffic from competitors, except as restrained by conditions which the Commission imposed. Measured by any standard, the merged company would be by far the largest railroad company in the United States.

The competitive impact on E-L would be the greater because the merged Penn-Central would virtually blanket the territory served by the lines of the E-L System.

E-L is satisfied that the formulation of *adequate* traffic conditions was and is not impossible but that it was and is by no means a simple matter. Some of the deficiencies in the Appendix G conditions could have been cured easily, as will appear shortly, but that certainly does not apply to all.

Second, the Commission itself recognized that the Appendix G traffic conditions, by themselves, could not be expected to provide adequate protection. It was for that reason that the Commission provided for the indemnification condition.

Third, there can be no doubt that the Commission's statement in the Report of September 16 (B-41) that E-L,

D&H and B&M "have raised valid issues as to interpretation, application, scope, and other aspects of the protection" applied to the traffic conditions as well as to the indemnification condition. Otherwise, why did the Commission order a further hearing with respect to the traffic conditions?

In the following discussion of the deficiences of the Appendix G traffic conditions, the provisions relating to enforcement are mentioned last because that seems more orderly. However, the extraordinarily defective enforcement procedures are pertinent in considering the other defects in the traffic conditions.

"Competitive Factor"

The majority opinion undertakes to quote what it calls the "basic mandate" (A-28, footnote 10). The quotation is of a *portion* of section 1 of Appendix G (327 I.C.C. at 561). The quotation omits four lines and a fraction which contain two important qualifications on the "basic mandate".

The first qualification is that the restriction is to apply only during the "protective period", as defined in section 1. It is true that the footnote in the majority opinion (A-28, footnote 10) refers to that qualification, but it does not refer to the definition of the "protective period" or to the serious and substantial objections made by E-L to that definition (see p. vi-ix below).

The second qualification on the "basic mandate", which the majority did not mention at all, is that it applies only *"on traffic for which E-L, D&H and B&M are competitive factors"* (327 I.C.C. at 561, lines 4 and 5).

Since the conjunction *"and"* is used in the quoted words, literally section 1 would apply only if all three carriers fall within the definition of "competitive factor" as to the traffic involved. The language in the balance of the Commission's text of Appendix G and in the Report indicates quite clearly that this phraseology was inadvertent and that the Commis-

sion must have meant to have the provisions of section 1 apply if any one of the protected carriers, rather than all three, was a "competitive factor". Otherwise the "basic mandate" would be absurdly restricted in the case of E-L, whose System extends from the Port of New York to Chicago, reaching many intermediate cities and competing with Penn and Central virtually throughout the E-L System. A protective provision that related only to E-L traffic in which both D&H and B&M participated, consisting almost entirely of traffic moving to and from New England, would leave E-L completely unprotected as to a very large portion of its traffic.

A serious problem is raised by the definition of "competitive factor" in section 2 of Appendix G (327 I.C.C. at 562):

> "2. The term 'competitive factor' shall be construed to mean that at the date of this order or at the time this merger application was filed, E-L, D&H or B&M was both participating in the particular route, rate or service and was handling traffic thereon."

The definition involves two tests:

1. The *kind of activity* which would make E-L, D&H or B&M a competitive factor ("participating in the particular route, rate or service and • • • handling traffic thereon"); and

2. The *controlling time or times* when such activity was conducted ("at the date of this order or at the time this merger application was filed").

The Commission's definition is defective as to both of these tests.

It is defective as to the kind of activity because it fails to cover *competitive* activity, as between one or more of the protected carriers and the applicants (or the merged company), the kind of activity specified in the Com-

mission's Report as intended to be covered (327 I.C.C. at 532). The effect of this deficiency in the Commission's definition of the term "competitive factor" is that the broad prohibitory words of section 1 of Appendix G would apply only to changes in "routing practice and/or freight rates or services" on a route in which E-L, D&H or B&M was participating on one of the dates specified in the definition. The prohibitions of section 1 would not apply to changes made in routes of Penn or Central in which none of the protected carriers participated. The merged company could thus establish new routes or make changes in rates or services on existing routes which would result in the very diversion which the traffic conditions were presumably designed to prevent and which might well be fatal to the route in which one of the protected carriers participated on one of the specified dates.

The Commission's definition is defective as to the controlling times in that it specifies two precise dates (the date of the order or the date of filing of merger application) and fails to provide for (1) significant activity occurring at any time *between* those two dates and (2) the prospect that competition may develop during the protective period as to traffic which did not exist on either of those two dates.

Kind of Activity: For the traffic conditions to be adequate, two separate and distinct kinds of activity should be embraced by the definition of "competitive factor":

(1) Competition for traffic between any one of the protected carriers and the applicants or the merged company; and

(2) Participation in an interline movement of traffic by an applicant or the merged company in conjunction with any one or more of the protected carriers, without regard to whether such interlined traffic moves on a route in competition with another route in which an applicant or the merged company participates.

As to (1), the controlling factor should not be that the protected carrier participates in the "particular route, rate or service"; the controlling factor, as to competitive activity, should be simply that one of the protected carriers competes with one or both of the applicants or with the merged company for the handling of the traffic in question.

As to (2), the term "competitive factor" should apply to traffic interlined on routes of one or both of the applicants or the merged company, on the one hand, and one or more of the protected carriers, on the other hand. It is patently just that the restrictions of Appendix G should apply to such interlined traffic, without regard to whether it is traffic moving in competition with any other route maintained by the applicants or the merged company, since alterations of service, operating schedules or routing practices on such routes could have a seriously adverse effect on a protected carrier.

Controlling Times: The Commission's text fixes the date of the filing of the merger application, March 9, 1962, and the date of the Commission's order, April 6, 1966, as the two controlling dates and says nothing as to the period between those two dates.

The Commission's formula would not cover seasonal traffic which did not move on either of the two specified dates, such as, for example, the movement of certain agricultural commodities or the movement of ore via Lake Erie ports which would not have commenced as early in the year as April 6 because of cold weather conditions. Furthermore, other traffic may not have moved on March 9, 1962 or April 6, 1966 but may have moved the day before or the day after one of those dates.

Another defect in the Commission's definition is that it does not cover new traffic, such as, for example, traffic from or to a new steel plant which could be served by both E-L and the merged company.

"Protective Period"

Appendix G to the April 6 Report defines "the protective period" as follows (327 I.C.C. at 561):

> "Pending final determination of the petitions for inclusion filed by E-L, D&H, and B&M in this proceeding and in Finance Docket No. 21510 et al., or such other period of time as the Commission may prescribe, hereinafter called the protective period***."

In its petition for reconsideration of July 8 E-L objected to the Commission's definition and proposed another definition (Exhibit E to E-L's complaint at p. 9-17; R. 475-483).

As will appear, a just and reasonable definition of the protective period was extremely important when E-L's petition of July 8 was filed. It *may* be less important now because the Commission *may* adopt a just and reasonable definition following the hearings now being held (and after briefs and argument). However, there is no assurance that, if in the meantime the merger be consummated and the Commission hands down a decision in F.D. No. 21510 which does not deny E-L's petition for inclusion in the N&W System, the merged company will not contend that the protective period has already expired.[1] In any case, the definition of the "protective period" in section 1 of Appendix G (327 I.C.C. at 561) is the only one now in existence, and certain of its defects should be noted.

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[1] The Report of April 6 provides as follows with respect to the petitions of the three "protected carriers" for inclusion in the Penn-Central System (327 I.C.C. at 530-531):

> "They will be considered dismissed as moot without further order herein, concurrently with any grant in whole or in part of the petitions in *N&W* merger case becoming effective."

The September 16 Report changed the wording of section 9 of Appendix A so that E-L would have a right to file a supplemental petition for inclusion in the Penn-Central System only if "there be a final determination denying" its petition in the N&W merger case (B-32).

1. The first is quite a simple one and the Commission could easily have passed upon it in the Report of September 16. It is that the words "final determination" are ambiguous; for E-L the ambiguity is a serious matter; the Commission's intent cannot be ascertained with finality from the text of the Commission's Reports; and yet it is not difficult to word a definition which is both reasonable and explicit.

E-L's objection to the Commission's use of the words "final determination" without a definition of them must be considered in the light of the fact that, if the Commission approves E-L's inclusion in the present N&W System on terms acceptable to E-L and its stockholders, N&W can be expected to institute litigation in the Courts. The duration of any such litigation cannot be foretold.

E-L proposed the following definition (p. i of Appendix 1 to Exhibit E to E-L's complaint; R. 583):

> "As used herein, the term 'final determination' shall mean an order of this Commission or the judgment or order of any court (of original or appellate jurisdiction) which finally disposes of such protected carrier's petition for inclusion, leaving the parties with no further recourse to this Commission or to any court with respect to such petition."

It is submitted that E-L's proposed definition is simple, explicit and fair—hence "just and reasonable"—and eliminates a serious defect in section 1 of Appendix G, the failure to define "final determination".

2. A second serious defect in the Commission's definition of "protective period" is the failure to provide for protection during the time, following a determination favorable to E-L as to its inclusion in the present N&W System, which will be required to effect that inclusion.

It would be necessary to obtain assents by E-L's stockholders at a special meeting. In that connection, it would be necessary to issue a Proxy Statement, conforming to the Regulations of the Securities and Exchange Commission. The preparation of such a Proxy Statement would not be a simple matter; much data would have to be obtained from a presumably uncooperative N&W; and the Proxy Statement would have to be submitted to, and cleared with, the Securities and Exchange Commission.

After favorable action by E-L's stockholders, it would be necessary to carry out all the steps which would be required to effect the inclusion.

Usually when two corporations are planning a unification, whether by merger, by an acquisition of control or in some other way, the managements of the two corporations collaborate in organizing the work to be done, in preparing necessary legal documents, and otherwise. In this instance there is at present no basis for expecting that N&W will collaborate with E-L in expediting the inclusion of E-L in the N&W System even after N&W has exhausted all methods of opposing the inclusion.

E-L's position was and is that it is only just to provide that the protective period should last for at least a year after a favorable final determination of an E-L inclusion petition, and that the Commission should have authority to extend the period beyond the year if an extension appears just and reasonable at the time.

E-L's proposed definition of "protective period" provided specifically that in any event the protective period would end when an inclusion should have been effected so that the provisions for the additional year after a favorable "final determination" and for Commission authority to extend the period beyond that year would be subject to the condition that, whenever an inclusion was effected, the protective period would end.

3. There are other defects in the Commission's definition of "protective period" (E-L's petition of July 8, Exhibit E to E-L's complaint, at p. 9-17; R. 475-483), but those just summarized are perhaps the most important.

"Traffic"

The term "traffic" is nowhere defined in Appendix G but various references in section 1 of Appendix G to "freight rates" and to "freight traffic" in sections 1.B. and 1.D. make it clear that the Commission intended the protection of Appendix G to apply only to the movement of freight (327 I.C.C. at 561).

However, E-L also competes with both Penn and Central for the transportation of mail and express. In 1965, for example, E-L's mail and express revenues totaled $8,951,480.[2] Appendix G provides E-L with no protection whatever against diversion of mail and expreas traffic and revenues to the merged company.

E-L's petition for reconsideration and other relief of July 8 asked that there be a definition of the word "traffic", and that that word be so defined as to include mail and express (Exhibit E to E-L's complaint, Appendix 2, p. ix-x; R. 603-604). The basis for the request was that the objective of the protective conditions was to protect each of the protected carriers as to traffic for which any of the protected carriers competes or might compete with the applicants or the merged company. Since E-L competes with both of the applicants and would compete with the merged company for the transportation of mail and express, there appears to be no just reason why the traffic conditions should not apply to mail and express as well as to freight. Furthermore, the amount of E-L revenue involved, almost $9 million in 1965, is by no means insignificant.

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[2] This figure is taken from E-L's Form A Report for 1965, which is a part of the record before the Commission.

The failure to include mail and express revenues in the Appendix G protection may be cured, from and after some unknown future date, by an order of the Commission modifying the Appendix G traffic conditions. But in the meantime E-L will suffer from the absence of protection as to mail and express traffic, even though it would seem that the defect in the Appendix G conditions with respect to such traffic could readily have been cured for the interim period at the end of which there may be modifications of the traffic conditions.

"Operating Schedules"; "Car Supply"

Appendix G contains no reference to operating schedules and no explicit prohibition against the merged company changing either the frequency of its trains on any given route or the speed of movements from one point to another. Such changes can be very effective to divert traffic from competitors.

E-L's petition for reconsideration of July 8 asked that the general prohibition to be found in section 1 of Appendix G be extended to cover new or changed operating schedules which might have a diversionary effect on any of the "protected carriers" (Exhibit E to E-L's complaint, Appendix 2, p. xvii-xviii; R. 611-612), and that the words "operating schedule" be defined (*id.*, p. viii; R. 602).

A railroad has effective means of obtaining traffic when it can supply shippers with freight cars, including special purpose cars, which a competing carrier cannot supply. There is nothing in the Appendix G conditions to prevent the merged company from using car supply as a means of diverting traffic from E-L, D&H or B&M, unless the word "services" in section 1 of Appendix G would include car supply.

E-L asked that the word "service" be defined, and that, as defined, "service" include "provision of cars (whether or not special purpose cars)" (Exhibit E to E-L's complaint, Appendix 2, p. vii-viii; R. 601-602).

As to both of these matters, what is said above under the sub-heading "Traffic" about mail and express revenues would seem clearly to apply. The curing of the defects should not have been complicated, and it is not just that E-L should suffer, even if only for an interim period of unknown duration, from the defects.

Force Majeure

Section 4 of Appendix G provides (327 I.C.C. at 562):

> "This appendix constitutes a plan for protection against the effects of the applicants' merger and does not apply to loss caused by: * * * (d) economic depression; (e) strikes; (f) act of God; or (g) other similar state of affairs."

When E-L studied this section it was uncertain whether it applied to the traffic conditions, because the section says that it "does not apply to *loss* caused by" the things which are mentioned.

E-L also objected vigorously to the great uncertainty which some of the language is bound to generate.

Accordingly, E-L's petition of July 8 pointed out its objections to section 4 as promulgated by the Commission, and proposed a revision of the section (Exhibit E to E-L's complaint, p. 33-36; R. 499-502). This is not a very complicated subject. E-L's discussion of it in the petition of July 8, including E-L's proposed text and supporting explanation, took only three pages.

As to whether section 4 applies to the traffic conditions, the September 16 Report contains what might be described as a possible indication that it does, since the enumeration of the sections of Appendix G (referred to in the September 16 Report as "paragraphs") near the bottom of page B-43 provides for the rescission of section 3 and section 5C of Appendix G, both of which relate exclusively to the indemnification condition, and does not mention section 4.

One wishing to know what the words "economic depression" mean might ask these questions: Only a nation-wide depression or one affecting all the Eastern District? Would the words cover a depression in part of the Eastern District? How important a part would it have to be? If there were an economic depression, why should the merged company be permitted to divert traffic from E-L if E-L was suffering as severely, or perhaps even more severely, from the depression?

What is the meaning of the word "strikes" in section 4? A railroad strike involving an entire system, or any railroad strike no matter how limited its effect? A strike in the steel, coal or automobile industry which affects rail shipments?

What is the meaning of the words "other similar state of affairs"?

The Court's attention is respectfully called to the discussion of this subject at pages 33-36 of Exhibit E to E-L's complaint (R. 409-502). E-L proposed a revised section 4 which, it is submitted, was explicit, just and reasonable.

Enforcement Procedures

E-L's petition of July 8 (Exhibit E to E-L's complaint) dealt, principally at pages 37-45 (R. 503-511), with the enforcement procedures under section 5 of Appendix G. The discussion of section 5C at pages 42-43 is no longer relevant, since section 5C has been rescinded (B-43, B-44).

The text of E-L's proposed revision of section 5 appears at pages ix-xi of Appendix 1 to the July 8 petition (R. 591-593). We will summarize some of E-L's principal points briefly.

The first step to enforce a traffic condition is to file with the Commission's Board of Suspension "a statement verified by an appropriate official of the complainant" which shall contain "*all the data* giving rise to the complaint". This requirement must be considered in relation to the provisions of Section 5D.(1), next to be mentioned.

Under section 5D.(1) a determination whether the complainant is a "competitive factor" shall be made within 10 days after a complaint is filed. There is no requirement for any of the steps which are ordinarily associated with due process prior to this crucial determination, which is to be made summarily and *ex parte*.

If the "competitive factor" determination is favorable to the complainant, then the Board of Suspension is required to "conduct an investigation". Section 5B.(2). The final decision must be made within 90 days after the complaint is filed (section 5D.(1)) and the Board of Suspension is required to issue an order within that period. There is no requirement, express or implied, that there be any hearing or an opportunity to submit briefs or have an argument. Indeed, there is not even any requirement that the Board disclose the basis for its decision.

The combination of the requirements that the crucial issue as to whether the complainant is "a competitive factor" be made within 10 days and that upon a determination of that issue favorable to the complainant the Board of Suspension merely "conduct an investigation" and issue a decision within 90 days, and the complete absence of any provision for any of the steps ordinarily associated with due process at any time, suggest that the Commission had in mind enforcement procedures which would be primarily, if not exclusively, *ex parte*.

It is true that section 5D(3) provides (327 I.C.C. at 563):

> "Special rules for proceeding before the Boards and appealing therefrom shall be promulgated by this Commission at a future time."

However, this provision certainly affords no assurance that the Commission will make any essential changes in the enforcement procedures set forth in the preceding provisions of section 5.

E-L's petition of July 8 proposed specific changes in section 5 (Appendix 1 to Exhibit E to E-L's complaint at p. ix-xi; R. 591-593).

It is submitted that the Commission's enforcement procedures do not provide for compliance with "the rudimentary requirements of fair play". *Cf. Morgan* v. *United States*, 304 U. S. 1, 14-15 (1938). Speed rather than effectiveness or fairness, is the *sine qua non*.

The majority opinion said that, in the period while the present traffic conditions are in effect, "any foul blows would be the subject of immediate and effective complaint" (A-30). Thus, in a few words, the opinion *assumed* that (1) the restrictions of the traffic conditions are clear, (2) any violations of those restrictions can be discovered immediately, and (3) the Appendix G enforcement procedures can be counted on to assure compliance with the traffic conditions.

While the reach of the majority's few words about "immediate and effective complaint" is much broader, the assumption that E-L's objections to the enforcement procedures were without substance, and that the procedures would be effective is perhaps particularly striking. E-L had summarized its objections to the enforcement procedures in its Post-Argument Memorandum, submitted to the Court below (R. 1378-1379). The objections were along the lines indicated above and were certainly substantial. The majority opinion simply ignored them.